PRESIDENTIAL POWER OF PARDON
-A CRITICAL STUDY

DISSERTATION

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C E R T I F I C A T E

This is to certify that Mr. Mohammad Ali Khan of LL.M.(final) has completed his dissertation entitled "Presidential Power of Pardon : A Critical Study" in partial fulfilment of the requirements for the award of LL.M. degree under my supervision.

I wish him all success.

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C O N T E N T S

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TABLE OF CASES

I N T R O D U C T I O N

The principal forms of mitigation of punishment consist of pardons and commutations of sentences. Pardons are very ancient in origin. To what extent pardons are found among primitive peoples can not be ascertained, since the monographic studies of their ways of life contain so little coverage on an item of this sort. According to Jensen's researches, Hammurabi's son pardoned a slave; king David is reported to have used the pardoning power; the "assembled people" of Athens could remit penalties; the Roman emperors exercised the pardoning power; clemency was used among the early Germanic Tribes and by the early English king.[1] In modern England applications for pardon are reviewed and recommended by the Home Secretary's office, acting for the king. The pardoning power in the United States, descending from sovereignty of English kings, is vested in the President for federal offences and in the Governors of the states for offences against state code.

In times the prerogative of mercy or pardon is an indispensable component of a well balanced system of criminal

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1. Christen Jenses, 'Pardon' Encyclopaedia of the Social Sciences (New York, Macmillen 1933) Vol. II p. 571.

jurisprudence and mitigation of severity is considered humantarian. Accordingly, the executive has been invested with the power to grant pardon when prescribed penalities were severe in individual cases.

The pardoning power usually contains the lesser power of commutation of sentence. A death penalty may be commuted to life imprisonment or a sentence of imprisonment reduced in length by commutation. Commutation is not a conditional or an unconditional pardon but a change from a higher to a lower penalty in the scale of punishment it is a form of clemency, as is the pardon, but to a lesser degree.

These provisions are contained in our constitution under Article 72 which is the topic of this dissertation also. Wherein the President is empowered to grant pardon, reprieve, respite remission or to suspend, remit or commute the sentence of any person convicted of any offence.

The degree of severity depends on what hardship a people are accustomed to. For example, in a society what has accustomed to anesthetics, the people are more sensitive to physical pain. Undoubtedly, in the patterns of living, as well as those of punishment, have created the softness, rather than the softness creating the change in the patterns. To illustrate by analogy, we are not so much concerned with the fact that modern individuals may not be able to withstand an operation without anesthetic

so readily as their great-great grandfathers could as we are with the fact that the practice of surgery has changed and involves less hardship to the patient.

Pre-constitutional position of the pardoning power was the same as in England, since the sovereign of England was the sovereign of India. Conferment of executive clemency is found through all the criminal procedure codes. Appellate courts were given power to suspend sentences pending appeal. Codes of 1861 and 1872 gave power of remission at the hands of the executive. Codes of 1882 and 1988 conferred additional powers on the executive to suspend sentences at any time. But these latter codes further provided that the power has to be exercised by the appellate courts "for the reasons to be recorded in writing". It is pertinent to note that this stringent procedural formality was not made applicable to the executive power. This evidently indicates a clue regarding different nature of clemency or suspension powers exercisable both by executive and judiciary. Under the Government of India Act 1935 the pardoning power was contained in Section 295. So the exercise of the king's power remained not only uneffected, unfettered and unparallel but also enjoyed absolute privilege throughout all times. The same power of pardon has been conferred on the President of India and on the Governors of the State by Articles 72 and 161 respectively. It is the

constitutional scheme the administration of justice is in the hands of judiciary; so the judiciary has to pronounce the judgment and the sentence and it is for executive to enforce it. The logic behind providing mercy as prerogative of pardoning is to prevent injustice and serve public welfare. That is why mercy power has been granted to the President under the constitution. The President being the Supreme Head of the State possesses this supreme power.

It may be stated that judicial power is governed by judicial considerations and the executive power is governed by consideration of public policy. Though these two powers may have field similar to be effected but these operate in distinct and on different principles.

The question regarding pardoning power before the Supreme Court was raised in Nanavati case[2] where Supreme Court by a majority temporarily departed from the settled law of pardon. But scintillating judgment of J. Kapur in dissenting opinion served as a string in this law and deserves the festoon of continuity in keeping to distinct both these executive and judicial control over the sentence. In Kuljeet Singh case[3]

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2. Infra n. 28 at p. 47
3. Infra n. 34 at p. 54

another important question was raised that power conferred by Article 72 on the President to grant pardon and commute sentences was a power coupled with a duty which must be fairly and reasonably exercised. But the court observed that President's power may have to await examination on an appropriate occasion, and that appropriate occasion was got by court in Kehar Singh case[4] where some important points were decided.

Whether death penalty is constitutional or not is not the subject of this dissertation even then its relevance rather importance can be discussed here succintly, because the issue has been raised in some cases while discussing the nature and scope of Article 72 of the constitution. As in Bachan Singh case[5] it was submitted with some vehemence and persistence by Shri R.K. Garg that Jagmohan's case[6] needs reconsideration as

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4. Infra n. 46 at p. 63

5. Bachan Singh v. State of Punjab, A.I.R. 1980 SC 893 and A.I.R. 1982 SC 1325.

6. Jagmohan Singh v. State of U.P., A.I.R. 1973 SC 947.

   In this case the constitutional validity of death sentence was for the first time convassed before Supreme Court where it was held that death penalty is not unconstitutional on the ground that no procedure is laid down by the law for determining whether the sentence of death or something less is appropriate in the case. Capital sentence is not per se unreasonable or not in the public interest.

the death penalty is unconstitutional. But the Supreme Court reaffirmed its earlier decision and held that the provision of death penalty as an alternative punishment for murder in Section 302 I.P.C. is not unreasonable and it is in the public interest.

However, Justice P.N. Bhagwati did not agree with the majority view and gave a dissenting judgment holding that Section 302 I.P.C. in so far as it provides for the invocation of death penalty as an alternative to life sentence is ultra vires and void as being violative of Article 14 and 21 of the constitution since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by the imposition of death sentence.

While expressing his view he observed that no possible judicial safeguards can prevent conviction of the innocent ... This is the drastic nature of death penalty, terrifying in its consequences which has to be taken into account in determining its constitutional validity. Death penalty is barbaric and inhuman in its effect, mental and physical upon the condemned man and is positively cruel. Its psychological effect on the prisoner in the Death Row is disastrous.

The same issue as to reconsider the constitutional validity of the statutory provisions in the Indian Penal Code

providing for the death sentence was raised by Shri Shanti Bhushan in Kehar Singh case[7] while emphasising upon the dissenting judgment in Bachan Singh case. But Supreme Court reaffirmed the validity of death sentence as decided in Bachan Singh case and refused to reopen the issue. As the law stands, life imprisonment is rule and death penalty is given in the "rarest of rare" cases.

Recently[8] Supreme Court bench comprising Mr. Justices G.L. Oza, Mr. K.N. Singh, Mr. M.M. Dutta, Mr. K.J. Shetty and Mr. L.M. Sharma held that delayed disposal of a condemned prisoner's petition either by the President or the Governor entitles him to move the Supreme Court for commutation of death sentence.

While upholding the validity of death sentence the Supreme Court held that 'delay' starts from the date of finality of verdict by the apex court but the time spent by the condemned prisoner in filing review petition and repeated mercy petitions before the executive shall not be considered for commuting his death sentence to life imprisonment.

The much awaited verdict has set at rest the long drawn controversy raked up by conflicting views expressed by different benches each comprising two judges and three judges on the

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7. Kehar Singh v. Union of India, A.I.R. 1989 SC 653.

8. Times of India, February 9, 1989.

condemned prisoner's right to seek commutation if there was delay in execution of sentence. While the two judges bench in Vatheeswaran case[9] held that two-year delay in the execution of sentence was sufficient for commutation, a three judges in Sher Singh[10] case held that delay alone is not good enough for commutation and two-year delay could not be laid down as rule.

While specifically the period during which the President must decide a mercy petition, the judges however said "it must be observed that when such petitions under Article 72 or 161 of the constitution are received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously". Mr. J. Shetty said in his judgment that the court can not prescribe a time limit for disposal of even 'mercy petitions' because the time taken by the executive or President may depend upon the nature of the case and the scope of inquiry to be made.

In Maru Ram[11] and Kehar Singh[12] cases the Supreme Court has given a constitutional impetus to the President's power of pardoning. Neither the delay of two years nor three years or delay as a whole has been held as a potent factor for converting

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9. T.V. Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361.
10. Sher Singh v. State of Punjab, AIR 1983 SC 465.
11. A.I.R. 1980 SC 2147.
12. Infra n. 46 at p. 63.

the death sentence into a life imprisonment or setting the convict at liberty. Assuming that the death sentence is an "exception" given in the "rarest of rare cases" is regarded a constitutional necessity in our society. Therefore, the scope of Article 72 has assumed a greater constitutional importance in view of retaining the capital punishment as prescribed by the law a perfectly valid procedure.

The court has further refused to prescribe the time limit within which the mercy petition under Article 72 shall be disposed of by the President. This has rightly been done by the court. Because in some cases it may not be possible for the President of India to do justice while disposing of mercy petition. As the court has rightly observed that the higher authority may be there to detect the error if any committed by the apex court while finally determining the sentence.

The very purpose of Article 72 is to enable the President of India to dispose of the mercy petition on merits and not by way of mechanical and bureaucratical manner. Because the very purpose of confirmation of the death sentence by the High Court and the Supreme Court as the apex court of the land and ultimately by the President of India is that no innocent person should be hanged because of his no crime. Keeping the fallibility of human beings, the Supreme Court has conceded the

right of President to review the mercy petition of the convict on merits without giving any consideration to the judgment of Supreme Court. Further supreme court has asserted itself to judicially review the mercy petition disposed of by the President under Article 72 not on merits but on irrelevant, irrational and extraneous considerations.

Keeping this constitutional significance and importance of the power of the President under Article 72 of our constitution I have deliberately chosen it as the topic of my dissertation.

The dissertation consists of three chapters. The historical aspect of the power of pardon of President of India as contained in Article 72 of the constitution has been very elaborately dealt in chapter I. While tracing out historical background of the power to pardon an attempt has been made to see the British practice as it was available in England and during the British Raj in India and also the debates of the Constituent Assembly.

Chapter II deals with the conceptual meaning of various terms used in Article 72 of the Constitution of India.

The Scope and ambit of the judicial review of Supreme Court with regard to Article 72 is the thrash of the Chapter III.

In the ultimate analysis a humble effort has been made to conclude the discussion relating to Article 72 or the Presidential power of pardoning in the concluding part of the dissertation.

C H A P T E R - I

HISTORICAL PERSPECTIVE

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A) ENGLAND

Generally speaking the pardoning power of the executive in India is the same as the power of the king or queen of England and the President of U.S.A. and more specifically as before our constitution came into force the law of pardon in India was the same as in England. The framers of the Indian Constitution followed the time-honored tradition of conferring the pardoning power on the executive head of the state. So in order to have a historical study of this power it is necessary to start it from the origin of the Crown pardoning power.

The origin of the Crown's pardoning power is connected with the Crown's prerogative. So to discuss the Crown's pardoning powers, history of prerogative is indispensable. What preregative is can only be understand by the definition and the decision of the leading cases.

By the word 'prerogative' we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from pare and rogo), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature

singular
/and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradiction to others and not to those which he enjoys in common with any of his subjects : for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore, Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.[1]

According to Wade - The medieval king both feudal lord and head of state, as chief feudal lord and in theory the owner of all land the king had all the rights of a feudal lord and in addition certain exceptional rights over and above those of all other lords. Like other lords the king could not be sued in his own courts, as there was no lord superior to the king, there was no court in which the king could be sued. In addition the king as head of the state had powers accounted for by the need for the preservation of the state against external foes and in "undefined residue of power which he might use for the public good".[2]

As we have observed that medieval lawyers did not regard the king as above the law. Moreover, certain of the royal functions could only be exercised in certain ways. The common

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1. Blackstone's Commentaries, 239.
2. 44, Sir David Keir and F.H. Lawson, Cases in Constitutional Law, ed. 4.

law courts were the king's court and only through them could the king decide questions of title to land and punish felonies. Yet as the fountain of justice the king possessed a residuary power of doing justice through his council where the courts of common law were inadequate.

The common lawyers asserted that there was a fundamental distinction between what come to be called the ordinary as opposed to absolute prerogative. The ordinary prerogativement those royal functions could only be exercised in defined ways and involved no element of royal discretion. Thus, the king could not himself act as a judge; he could dispense justice through his judges. The king too could exercise legislative authority through Parliament : The case of proclamations. The absolute or extra-ordinary prerogative meant those powers which the king could exercise in his discretion. It was round the absolute prerogative that the 17th century struggle between king and parliament centred. The king has undoubted powers to exercise discretion in the interest of the state, especially in times of emergency, but the claims the Stuart Kings in this regard could not be reconciled with the growing claims of Parliament. The absolute prerogative covered a wider field than the king's right to take extra-ordinary action to meet emergencies. It was primarily around the king's emergency powers that the 17th century struggle turned, but the rights

to pardon a criminal or grant a peerage were also part of the absolute as oppose to the ordinary prerogative. They could be exercised at the king's discretion. Here are some of the leading cases with regard to the king's prerogative and most of which are decided in favour of the Crown.

In Bate's case[3], an information was exhibited in the Exchequer against John Bate, a merchant trading to Venice and the Levant, for his refusal to pay a poundage of 2S. 6d. The argument of the Counsel have not been preserved, but it appeared that Bate, having paid the statutory poundage, refused to pay the new duty because it was imposed unjustly against the statute 45 Ed. 3, C.4, which prohibited indirect taxation without the consent of Parliament. The decision of the Barons of Exchequer was unanimous for the king. The gist of the decision was that the king might impose what duties he pleased if it was only for the purpose of regulating trade and not of raising revenue, and the court could not go behind the king's statement that the duty was in fact imposed for the regulation of trade.

In the case of Ship Money[4] John Hampden, knight of the Shire of Buking-hamShire, refused to pay ship money, a tax levied for the purpose of furnishing ships in time of national danger. Counsel for Hampden conceded that sometimes the exercise

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3. (1606), 2 State Trials 371.
4. King v. Hampden (1637) 3ST. TR 825.

of danger will justify taking the subject's goods without his consent, but only in actual as opposed to threatened emergency. The Crown conceded that the subject could not be taxed in normal circumstances without the consent of Parliament, but contended that the king was the sole judge whether an emergency justified the exercise of his prerogative power to raise fund to meet the national danger. A majority of the court of Exchequer Chamber gave judgment for the king.

In the case of Godden v. Hales,[5] the defendant, as a Colonel of a regiment of foot, was obliged by the Test Act (25 Car 2) to receive the sacrament as the Act directed and to take the oaths of allegiance and supremacy within three months of being admitted to his charge. This he neglected to do, and was tried and convicted at the Kent assizes, whereupon the plaintiff as informer become entitled to a sum of £500 to be forfieted by the defendant for his breach of the Act; to recover which sum the present action of debt was brought. The defendant pleaded that within three months of his appointment and before the suit began, the (James-II) had by his letters patent under the Great Seal dispensed him from taking the oaths and other obligations imposed by the Test Act. The question was whether the dispensation was a good bar to the action.

The decision of Lord Chief Justice Herbert and of ten of the other eleven judges, (Street dissentiente), was:

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5. (1686) 11 State Trial 1165.

1. That the king of England are sovereign princes.
2. That the laws of England are the king's laws.
3. That therefore, it is an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases, and upon particular necessary reasons.
4. That of those reasons and those necessities, the king himself is sole judge, and then, which is consequent upon all.
5. That this is not a trust invested in, or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet was taken from them, nor can be. And therefore, such a dispensation appearing upon record to come time enough to save him from the forfeiture, judgment ought to be given for the defendant.

The decision can be upheld on less extravagant grounds, as was done by Herbert himself in the vindication of his judgment which he published later. He follows Y.B. II, Hen VII fol 11-12, in distinguishing between that which is malum in se and that which is merely malum prohibitum by statute. With the former the king can never dispense, though he may afterwards pardon. 'For a dispensation does jus dare, and makes the thing prohibited (to all others) lawful to be done by him that has it. And therefore, the king can not dispense with mala in se, because they never were, and never can be, made lawful; but even these (says the year book) may be pardoned after they are

done. The result is that 'whatever is not prohibited by the law of God, but was lawful before any act of Parliament made to forbit it, the king, by his dispensation, granted to a particular person, may make lawful again, to what person who has such dispensation, though it continues unlawful to everybody else. Therefore, dispensation granted to Sir Edward Hales did make it lawful for him to do so, though it continued unlawful for anybody else. However, even today the sovereign is regarded as the pivot on which the state machinery revolves and enjoys the sole executive place in the parliament by customs and laws. The Act of Settlement affirmed the laws of England to be the birth right of the people and "all the kings and queens who shall ascend the throne of this realm ought to administer the government according to the said laws, and their officers and ministers ought to serve them respectively according to the same".

It is, however, preferable to confine it to common law powers. It is also sometimes in the sense, that is now perhaps archaic, of certain of those attributes of the sovereign which result from the headship of the state. Thus, the term, prerogative of perfection, is used of the rule that the Crown can do no wrong : Prerogative of perpetuity of the rule that succession of the sovereign is simultaneous with the death of his predecessor. The leaving of the prerogative today is, however, that group of powers of the Crown not conferred by the statute but recognised

by the common law as belonging to the Crown.[6]

As we have seen that how the Crown has exercised his prerogative in general similarly the criminal proceedings may also be prevented by the exercise of royal prerogative of pardon. This power of pardoning is exercised by the Crown on the advice of Home Secretary of State that due to some special reason the sentence should not be carried out.

The king can pardon a criminal, either absolutely or upon condition, and this power wielded by the Home Secretary, is sometimes used as a means (a clumsier means there could not be) for practically nullifying an unsatisfactory verdict.[7] Before 1908 English law provided no adequate means of reviewing judicially the judgment of a criminal court, accordingly the method of rectifying any injustice was by the grant of a pardon. The Criminal Appeal Act, 1907, established the Court of Criminal Appeal - a similar court was established for Scotland in 1928. The prerogative of pardon is essentially an executive act and should not involve judicial issues. But the prerogative still remains and is in particular exercised by the Home Secretary in relation to death sentences, all of which by long standing customs are reviewed. By Section 19 of the Criminal Appeal Act, 1907, the Secretary of the State, on the consideration of any

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6. E.C.S. Wade, Constitutional Law of England, p.141

7. F.W. Maitland - "Constitutional History of England" p.476.

petition for the exercise of the prerogative, may (a) refer the whole case to the court of Criminal Appeal, and the case shall then be heard and determined by the court, as in the case of an appeal by the person convicted, or (b) if he desires the assistance of the court on any point arising in the case refer that point for their opinion thereupon.

The royal power of pardon does not extend to civil proceedings. If A owes B a debt, the Crown has no power to writ off the debt. So if A assaults or libels B, the Crown can not forgive A, or stop B from suing A. This is so, even when the wrong is a crime as well as a tort. Thus, in the case of false imprisonment, which is both a wrong in tort and a crime the queen can pardon the crime, but not the tort. The importance of this can be seen if we suppose the person guilty of false imprisonment to be a Secretary of state, for the Crown can not prevent his being sued. Heavy damages have before now been recovered against a Secretary of state. The Crown could not protect of its most eminent servants.

The one limit to the efficacy of a pardon is that imposed by the Act of Settlement (1700) namely, that a pardon can not be pleaded to an impeachment. In Danby's case 1678, it had been questioned whether an impeachment could be prevented by a pardon, it had been contended that an impeachment should be considered as analogous rather to an appeal of felony than to

an indictment at the king's suit. A pardon then can not stop an impeachment, but there is nothing to prevent king from pardoning after the impeached person has been convicted and sentenced.

The legal power of pardon then is very extensive indeed. The check upon it is not legal but consists of this, that king's Secretary may have to answer in the House of Commons for the exercise of that power.

B) THE LAW OF PARDON BEFORE CONSTITUTION

The law of pardon before the constitution came into force was the same as in England since the sovereign of England was the sovereign of India. However, it will be fruitful to trace out the legislative history of the relevant powers of the executive and the judiciary. In regard to suspension of sentences successive Criminal Procedure Codes conferred on the executive in India limited powers of clemency and also conferred upon the appellate court. Power to suspend a sentence pending appeals. It is better to mention some of the provisions of the different codes to understand the clear position of the executive and judiciary.

In the Criminal Procedure Code of 1861 (XXV of 1861) the power of the executive was confined to remission of punishments and was contained in the Section 54 which was as under:

"When any person has been sentenced to punishment for an offence, the Governor-General of India in Council, or the local Government, may at any time, without conditions or upon any condition which such person shall accept, remit the whole or any part of the punishment to which he shall have been sentenced".

Section 421[8] of the same code conferred power on the appellate court to suspend sentences pending appeals and release. After this the Crimincal Procedure Code of 1872 was enacted. Section 322 of which was dealing with the execution of sentences the power of the executive to remit punishment was contained in that Section.

Then again the Criminal Procedure Code was re-enacted in 1882 being the Act X of the 1882. The power to suspend or remit sentences was contained in a separate chapter headed "suspension, remission and commutations of sentences" of which the relevant provision was in Section 401.

A new Criminal Procedure Code was enacted in 1898, a portion of which was subsequently amended. The section dealing with powers of suspension or remission of sentence is 401

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8. Section 421 of Cr.P.C. 1861, "In any case in which an appeal is allowed, the Appellate court may, pending the appeal, order that sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released on bail".

which reads as under:

"(1) when any person has been sentenced to punishment for an offence, the Governor-General in Council or the local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced".

The corresponding powers of the appellate courts is contained in Section 426, Chapter XXXI dealing with appeals etc. Section 426 is as under:-

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also if he is in confinement, that he be released on bail or on his own bond.

(2B) Where a High court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained, the High Court may, if it so thinks fit, order that pending the appeal the sentence or order appealed against be suspended, and also, if such person is confinement, that he be released on bail".

While going through all the above mentioned provisions of the different codes of criminal procedure, it becomes clear

that the Codes of Criminal Procedure of 1861 and 1872, confined the power of the executive to remitting at any time, the punishment inflicted on a person; the Codes of 1882 and 1898 conferred on the executive the additional power of suspending the sentence at any time. The Criminal Procedure Codes of 1861, 1872, 1882 and 1898 conferred on the appellate court power to suspend a sentence pending appeal, but the codes of 1882 and 1898, provided that the power was to be exercised for "reasons to be recorded in writing". Moreover, the powers conferred on the executive and on the appellate court were to be found in separate chapters of the codes, emphasizing the different natures of the two powers, and a difference which was further emphasized by the requirement that the appellate court should record its reasons in writing whereas no such obligation was imposed upon the executive. Of course, this does not mean that the courts did not exercise their power judicially previous to the Act of 1882. The words contained in Section 426 "for reasons to be recorded in writing" are showing that legislative wanted to make it clear about the essential difference in the nature of the exercise of the power conferred on the executive and on the judiciary.

After coming into force of the Government of India Act, 1935, the law of pardon was contained in Section 295 of that Act. Provisions as to death sentences (1) "where any person has been sentenced to death in a province, the Governor-General

in his discretion shall have all such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but same as aforesaid no authority in India, outside a province shall have any power to suspend, remit or commute the sentence of any person convicted in the province; provided that nothing in this Sub-section affects any power of any officer of Her Majesty's forces to suspend, remit or commute a sentence passed by a court martial (2). Nothing in this Act shall derogate from the right of His Majesty or of the Governor-General, if any such right is delegated to him by his Majesty, to grant pardons, reprieves, respites or remissions of punishment".

This was special provision as to the power of the executive to suspend, remitor commute a sentence of death. So the power of the king or of Governor-General as a delegate to grant suspension, remission or commutations remained unaffected by the introduction of a federal system with the division of the subjects between the centre and the provinces. This Section was in the part dealing with the provisions as to certain legal matters. Thus, under the Government of India Act the Governor-General in his discretion had the power to remit, sentence of death and Governors of Provinces had the power in regard to all sentences passed in a province but the power of the Governor-

General as a delegate remained unaffected by the first Sub-section of the Section. Thus, upto coming into force of the Constitution the exercise of the king's prerogative remained unaffected, was plenary, unfettered and exercisable as hitherto.[9]

C) CONSTITUENT ASSEMBLY DEBATES

It is convenient to note that the pardoning power of the President under Article 72 of the Constitution were contained in the draft article 59 of our constitution, when was debated in the Constituent Assembly. Under Article 72, the President is empowered to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence. The President can exercise this power in all cases where the punishment or sentence is by a court martial or for an offence against a law to which the union executive powers extends and in all cases of death sentence. This power shall not affect the power of an officer of the armed forces or of the Governor, in the case of death sentence, to suspend, remit or commute a sentence.

Article 72 has solved the problem arising out of divided jurisdiction. Though it was proposed by Mr. Tajammul Hussain, a member of the Constituent Assembly that clause (3) of the Article 59 be deleted. The reasons given by the member were

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9. Per Kapur J. (1961) 1 S.C.R. p. 541.

that :

"The President only should have the power to suspend, remit or commute a sentence of death. He is the supreme head of the state. It follows, therefore, that he should have the supreme power also. I am of the opinion that the rulers of the state or provincial government should not be vested with this supreme power ...."[10]

While giving reason for his proposal he further said that :

"The President of the Federation should be the supreme authority in respect of offences committed against Federal subjects. I say that there must not be divided loyalty on this subject. When the states came into the Federation they accepted the operation of the Federal Laws in their states and they accepted to that extent that the Federal Government was supreme and the President of the Federation as representing the Federal Government can alone be the authority who can grant pardons ..."[11]

But this proposal was rejected by the Constituent Assembly. Mr. R.K. Sidhwa, another member of the Constituent Assembly said that it is not denied that the President should

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10. C.A.D. Vol. 7, p. 1118, 390.

11. Ibid.

be the supreme authority and expressed his views after referring clause (1) of article 59.

"Similarly powers are vested in the Governors and they can also suspend, remit or commute a sentence of death. In my opinion it is very healthy they should continue to vest this power which existed under the old regime in the Governors of the Provinces for this reason that the Governor of a state is better informed of a particular case of pardon which is referred to him ...."[12]

But Dr. B.R. Ambedkar explained this in a more better and convincing manner in the following words:

"It might be desirable that I explain in a few words in its general outline the scheme embodied in Article 59. It is thus : the power of the commutation of sentences for offences enacted by the Federal Law is vested in the President of the union. The power to commute sentences for offences enacted by the State Legislature is vested in the Governors of the State. In the case of sentence of death, whether it is inflicted under any law passed by Parliament or by the law of states the power is vested in both the President as well as the state concerned this is the scheme ....".[13]

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12. C.A.D. Vol. 7 p. 1119.

13. C.A.D. Vol. 7 p. 1120.

Logically speaking that the power to commute a sentence of death is vested both in the Governor as well as in the President, he said:

"After all, the offence is committed in the particular locality. The Home Minister who would be advising the Governor on a mercy petition from an offender sentenced to death would be in a better position to advise the Governor having regard to his intimate knowledge of the circumstances of the case and the situation prevailing in that area. It was, therefore, felt desirable that no harm will be done if the power which the Governor now enjoys is left with him. There is, however, a safeguard provided supposing in the case of a sentence of death the mercy petition is rejected, it is always open, under the provisions of this article, for the offender to approach the President with another mercy petition and try his luck there. I do not think there is any great violation of any fundamental principle involved or any inconvenience that is likely to arise if the provisions in the draft article are retained as they are".[14]

Again there was a nebulous and uncertain position about the pardoning power of the President contained in the original sub clause (b) of clause (1) of article 59, regarding the concurrent list.

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14. C.A.D. Vol. 7 p. 1120.

The original sub-clause (b) of clause (1) of article 59 is as follows:

In all cases where the punishment or sentence is for an offence under any law relating to a matter with respect to which Parliament has, and the Legislature of the State in which the offence is committed has not, power to make laws". Therefore, to make it certain and clear Mr. T.T. Krishnamachari, a member of the Constituent Assembly proposed a new sub clause (b) of clause (1) of Article 59 which was adopted. The new sub clause (b) of clause (1) of Article 59 is as follows:

"In all cases where the punishment or sentence is for an offence under any law relating to a matter to which the executive power of the union extend".

This clause was again objected by Sh. K. Santhanam a member in the Constituent Assembly. As the words "made by Parliament" are absolutely essential to make the precise and clear.

But the scope of this new substituted sub-clause (b) of clause (1) of Article 59 was aptly defined by Dr. B.R. Ambedkar. "No, it can not extend further. The necessity for bringing an amendment in sub clause (b) is this : the executive power of the centre extends only to the matters enumerated in List-I but may also extend to matters enumerated in List III.

And the position of the Drafting Committee is this, that whenever a law is made by Parliament, in respect of any matter contained in List-III if the law confers executive power on the centre, the power of the President to grant reprieve must extend to that law. Therefore, these words are necessary. Mr. Santhanam's amendment is absolutely unnecessary and out of place because Article 60 covers that point".[15]

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15. C.A.D. Vol. 10 p.

C H A P T E R - II

SCOPE OF ARTICLE 72

SCOPE OF ARTICLE 72

The power to pardon has been exercised from the time immemorial by the head of the state. Whether he be an absolute monarch or a popular republic or constitutional king or queen. This humanistic or acrobate approach either to correct the grave injustice or to control the blood-shed or revolution is found in almost all the constitutions.

Generally the provisions of our constituion have been taken from the constitutions of England and America. That is why, while interpreting principle or provision may be of law of contract, or of criminal law or of constitutional law references are given of the English or American authorities.

Again in the constituent assembly debate it is recognised that the power to pardon which is vested in the President and the Governors of States is similar with that of the power of the king or queen in England and the President of America. However, the position of one country is not identical with that of other. As in England the head is monarch having no written constution whereas in America the wordings of the article containing pardoning power of the President is not identical with that of India.

The pardoning power of the President is contained in Article 72 of the constitution. Now as to the question that what is the scope of Article 72 can be judged and determined through the judicial decisions so far.

Article 72 provides that :

(1) The President shall have the power to grant pardons, reprieves, respite or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence -

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of the clause (1) shall affect the power conferred by law on any officer of Armed Forces of the union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub clause(c) of clause(1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governors of a state under any law for the time being in force.

PARDON

The term 'pardon' is first found in early French Law and derives from the Latin word 'pardonare' ("to grant freely") suggesting a gift bestowed by the sovereign. It has thus came to be associated with a somewhat personal concessions by a head of state to the perpetrator of an offence, in mitigation or remission of the full punishment what he has merited.[1]

This was a part "of that special pre-eminence which the king hath over and above all other persons and out of the ordinary course of the common law, in the right of his royal dignity".[2]

The pardon is said by Lord Coke to be a "work of mercy, whereby the king, either before attainder, sentence or conviction or after forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical".[3]

Pardon, as said by Holmes J. is not a private act of grace from an individual happening to process power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public

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1. Sanford H. Kadish, "Encyclopeadia of Crime and Justice" Vol. I, p. 58.
2. Bl. Comm. (1) 239.
3. 3 (Inst. 233).

welfare be better served by inflicting less than what the judgment fixed.[4]

Pardon, as described by Kayne J. in Ex Parte Wells[5] as an act of mercy and an act of clemency applicable to pardons of every kind and form. Whereas Field J. in Ex Parte Garland[6] termed it as the benign prerogative of mercy. It is the power for avoiding the execution of the judgment by reprieve or pardon whereof the former is temporary and the latter permanent.

REPRIEVE

Reprieve means a story of execution of a sentence or of enforcement of a penalty, for a temporary period. It is withdrawing, or suspending, for a time sentence of execution against a prisoner (Les Termes de la Lay)[7]. In America, a reprieve is granted till the birth of the baby where a female prisoner under sentence of death and also where a prisoner becomes insane after judgment under the constitution, the President and Governors shall also possess a power of reprieve to be exercised in fit cases.[8] Reprieve whereby the execution is suspended is merely the postponement of the execution for a definite time and it does not and can not defeat the ultimate execution of the judgment but merely delays it. It is extended

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4. Biddle v.Perovich, 71 L.ed. 1161,1163
5. 8 L.Ed. 640 at 643,644
6. 18 L. Ed. 366 at 370, 371.
7. New Law Dictionary, 2nd Ed.
8. Blackstone, Commentaries IV, XXXI.

to a prisoner in order to afford him an opportunity to procure some amelioration of the sentence which has been imposed upon him.[9]

RESPITE

Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction or the like. In England it is not available in the case of conviction of murder. Under our constitution the executive is also vested with this power.

REMISSION

Remission reduces the amount of a sentence without changing its character, e.g. a sentence for imprisonment for one year may be remitted to six months under Section 407 Cr. P.C. The central and states governments also possess this power through President and Governors.

COMMUTATION

Commutation is a change to a lighter penalty of a different form as under Sections 54 and 55 of the Indian Penal Code deals with commutation of a sentence of death and transportation for life. But Section 402 of Cr. P.C. is wider and says that each of following sentences may be commuted for the sentence next following it - death, imprisonment for life,

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9. Ex Parte Garland 18 L. Ed. 366 at 3705.

rigorous imprisonment, simple imprisonment, simple imprisonment fine. No limitation is imposed on the power of the executive in India to commute a sentence under this statutory provision just mentioned.[10]

NATURE AND OBJECT OF PARDON

With regard to the question as what is the nature and object of the pardoning power of head of the state. Before dealing with this question it is better to mention that power of the Indian President under Article 72 is similar with that of the power of the Crown in England and the power of the President of America under Article 2, Section 2 clause (1) of the American Constitution.[11] It will not be inappropriate to say that the framers of the Indian Constitution were not only familiar and trained in British Jurisprudence but were familiar with the American Constitution and they were drafting their constitution in English language and therefore to draw upon the American parallel would be wholly legitimate.

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10. K.M. Nanavati v. State of Bombay, AIR 1961, SC 113,114.

11. Marshall, C.J. said "As this power had been exercised from time immemorial by the executive of that nation whose language is ours language, and whose judicial institutions are ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it". U.S. v. Wilson, 8 L.Ed. 640.

Wayne J. in Ex Parte Well, 15 L.Ed. 421 at 424 said: "We still think so, and that the language in the constitution, conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption ...."

The President or a head of a state is granted the power of pardon with the view that there should be provisions in the law to save a person from the consequences of a punishment adjudged by inadvertence or mistake against that person by judiciary which being a human institution is likely to err. It is for that reason that the provision of pardon or mercy is made in every constitution, whether monarchical it may be or democratic. This position has been aptly stated in the following words:

The object of pardoning power is to correct possible judicial errors for no system of judicial administration can be free from imperfections. It is an attribute of sovereignty wherever the sovereignty may be to release a convict from a sentence which is mistaken, harsh or disproportionate to the crime.[12]

This is the constitutional scheme that administration of justice should be through courts of law. Hence it is for the judiciary to pronounce judgment and sentence, it is for the executive to enforce them. Generally the enforcement of these judgments and sentences create no difficulty but circumstance may arise where carrying out a sentence, or setting the machinery of justice in motion might imperil the safety of the realm. "Thus, if the enforcement of a sentence is likely to lead to blood-shed and revolution, the executive might well pause before exposing the state to such peril.[13]

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12. Basu, The Constitution of India 402.
13. Seervai, Constitutional Law of India, 3rd ed. p. 1756.

Sen Walter F. Mondale[14] has written in his article that during their debates the framers of the American Constitution mentioned clearly several reasons for the inclusion of the pardon power. James Wilson for instance noted that pardon particularly a person before trial might be necessary to obtain the testimony of accomplices. The framers also were apparently concerned that be a way to save a spy serving the executive in time of war when only the executive knew his service.

Above all else, the pardon power is an indispensable element of even the perfect system of laws. The pardon is the instrument of mercy and the way to correct those grave injustice either on their facts or by an anticipated operation of the criminal laws that simply must be remided.

Similar view was expressed in Ex Parte Grossman by Taft, C.J.[15] "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the court is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies to vest in some other authority than the court power to ameliorate or avoid

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14. Harnessing the President's Power (J. Bar Council India v. 4, 1975, p. 135.

15. 69 L. Ed. 527 p. 530.

particular criminal judgment. It is a check intrusted to executive for special cases".

The power of the President of America to pardon treason was stated as necessary and indispensable. Hamilton,thus aptly stated that "In seasons of insurrection or rebellion, a critical moments may arise where if a well time offer of pardon to the insurgents or rebels, the tranquility of the commonwealth may be destroyed. The dilatory process of convening the legislature or one of its branches for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal".[16]

Maitland expressed that king can pardon any person before or after the trial the only limitation is that of impeachment. The king can pardon a crimical, either absolutely or upon condition and this power, wielded by the Home Secretary, is sometimes used as a means (a clummsier means there could not be) for practically nullifying an unsatisfactory verdict.[17]

PARDON AND AMNESTY DISTINGUISHED

The word 'pardon' derives from the Latin Pardonare which means (to grant freely) suggesting a gift bestowed by

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16. Federalist No. 24, quoted in argument in Ex Parte Garland (1867) 4 Wal. 333.

17. Maitland F.W., "Constitutional History of England", p.476.

the sovereign. Amnesty on the other hand derives from the Greek Amnestia which means (forgetting) and has came to be used to describe measure of a more general nature, directed to offences whose criminality is considered better forgetten.[18]

The pardon and amnesty are different because the pardon is applied to a specified individuals whereas amnesty is applied to the unspecified number. Pardon is to forgive whereas amnesty is a promise not to take any action against the persons addressed if they will accept the order.

It sometime happens that a revolt or other political commotion takes place in a country. On such occasions the head of the state makes a proclamation that the rebels who surrender shall be granted pardon for the offences they have committed. May it be said that the President of India does not have this power under Article 72? But in this connection the matter which need particular attention that whatever word may have been used in the proclamation, the President or the head of the state in actual fact does nothing more than the promise that whatever action could be taken against them. So the question of granting pardon of punishment to such persons can arise only when a competent court would have held that such person had actually participated in it and so having been convicted for the same have been sentenced to a specified punishment. So whatever may be the word used in the proclamation in actual fact there is no grant of pardon of punishment

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18. Sanford H. Kadish, Encyclopeadia of Crime and Justice, Vol. I, p. 58.

but it is only a promise not to take any action against the rebels.[19] Pardon and amnesty is also distinguished by Basu[20] in the following words:

"The pardoning power should be distinguished from amnesty, while pardon remits the punishment imposed by a court upon an offender, amnesty overlooks the offence and absolves the offender from penalty".

By this he mean that President does not have the power of granting amnesty to rebels. In this connection, attention may be drawn to the fact that the power of pardon to the President under Article 72 is not unlimited, but is only in respect of the offences which have been indicated in Sub-clause (a),(b) and (c) of clause (1) of that Article. Thus, if the rebellion is against a state government the offer of amnesty may be made only by the concerned state. Be it as it may at least this is quite evident that pardon and the amnesty differ in their import and so amnesty does not fall within the ambit of Article 72. Supreme Court[21] of America also expressed the same opinion. It observed :

"Amnesty and pardon are of different character and have different purposes. The one overlooks the offence,

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19. Balakrishna, J.I.L.I. Vol. 13, 1973.
20. D.D. Basu, Commentary on the Constitution of India.
21. (1914) 59 L. Ed. 446.

the other remits punishment. Amnesty is usually addressed to classes or even communities. The function is exercised when it overlooks the offence and the offender leaving both in oblivion".

In re-Channugadu[22] case where on the occasion of the formation of the state of A.P. the Governor without reference to any provision of law issued an order granting amnesty to condemned prisoners. The court held that under Article 72 and 161 the head of state is given authority by means of an executive act to tender pardons and reprieves and those functions can be exercised even before conviction. How far a general jail delivery is wise, justified or expedient in circumstances prevailing in the country is a matter of perfectly within the discretion and decision of the executive authorities and need not to be discussed or decided by the court of law whose functions are entirely judicial.

The courts in India have distinguished the pardon and amnesty recognizing the different effect of both as well.

In Deputy Inspector General of Police, North Range Waltair and other[23] v. Raja Ram case the facts in brief of which are as follows:

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22. 1954 Cr. L.J. 1370 (Mad.)

23. A.I.R. 1960 Andhra Pradesh 259.

A Sub-Inspector of Police and some other Constables (respondents) were dismissed from service as they were convicted of offences involving moral turpitude under Section 331, 348 etc. of I.P.C. and were awarded various terms of imprisonment. They filed an appeal against their convictions in the High Court of Madras. Pending the appeal Andhra State was formed in October 1953. In 1954 Government of Andhra State declared a general amnesty to all the prisoners by an order No. 26, Law Department. The respondents were some of those who had the benefit of that order. Immediately thereafter the respondent asked the concerned authorities for postings upon beg told they were already dismissed from services. They moved to the High Court under Article 225.

Court held that on the construction of the general pardon (amnesty) not pardon, it did not purport to afford any pardon under Article 161 but was limited to the remission of sentences or had a limited operation. That the prisoners were absolved only from the punishment that was inflicted on them but not from the other penal consequences following from the conviction.

Chandra Reddy, C.J. "It is true the word general amnesty were employed in the preamble to that order that expression may lead to some counterance to the argument that what was granted was a general pardon. Since the meaning of the word amnesty is a general pardon. But that does not afford us much guidance

in deciding the exact scope of notification. It is plain from the concerned notification that the prisoners in the various jails in the state of Andhra were to be released to celebrate inaugration of Andhra state. The subsequent order makes it clear that what was remitted was the unexpired position.

He further said that we could not also over rule the fact that Section 401 Cr.P.C. under which order for release were to be promulgated is cited. This notification does not purport to afford any pardon to the prisoner nor does it make any reference to Article 161 of the constitution. Thus the order of the government in question is limited to the remission of sentences wholly and has a limited operation. That cannot be equated to a pardon".[24]

The court relied upon the U.S. and English cases that "the pardon (U.S. Supreme Court) if granted after conviction it removes the penalties and disabilities and restores him all his civil rights; it makes him, as it were a new man and gives him a new credit and capacity".[25]

The pardon granted under that amnesty was the subject of frequent consideration by American Courts. Having regard to the term of such a proclamation, it was decided in

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24. A.I.R. 1960 A.P. p. 262

25. Ex Parte Garland v. Wallance 333 (1867)

Knote v. U.S.[26] that grant of such a pardon would result in the blotting out of the offence and that thereafter the convicted person could asserts all his legal rights, since it removed all the penalities of the offence. He may usefully refer to the dictum of Field J. who delivered the opinion of the court in this context :

"A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of pardoning power or of officers under its direction. It releases the offenders from all disabilities imposed by the offence and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights".

In Hay v. Justices of Tower Division of London[27], Hawkins J. said that directly the crime of which a man had been convicted was pardoned, he was absolved not only from the punishment inflicted on him by the judge, who pronounced sentence, but from all penal consequences such as disqualification from following his occupation.

The first case in which the Supreme Court got an opportunity to express its opinion on pardoning power of the

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26. 1877 24 L. Ed. 42.

27. 1890 24 Q.B.D. 561.

executive was that of K.M. Nanavati[28]. The facts of the case are as follows:

The petitioner was second in command of I.N.S. Mysore which came to Bombay in the beginning of March 1959. There he was arrested on a charge of murder under Section 302 I.P.C. and was placed and continued to remain in naval custody all along during his trial. He was convicted by the High Court and was sentenced to imprisonment for life. With a view to filing an appeal in the Supreme Court, he applied to the High Court for a grant of certificate that the case was fit one for appeal to Supreme Court. The High Court however, rejected his application. So he applied to Supreme Court for granting special leave to appeal. Meanwhile the Governor of Bombay issued an order suspending the sentence of Nanavati immediately after it had been passed and the suspension was to remain operative till the Supreme Court had taken decision on the application for special leave filed by Nanavati. Rule 5 of the Supreme Court rules has a provision that a person desirous of obtaining special leave to appeal must first surrender to his sentence and to the authority which is competent to keep him in safe custody. Since Nanavati had not done so the question arose whether his petition could be heard without his having complied with rule 5. It was urged on behalf of Nanavati that the power of granting pardon

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28. K.M. Nanavati v. State of Bombay, (1961) 1 SCC 497.

which the Governor enjoys was unlimited and, therefore, the Governor could pass the sentence and having done so there was no sentence in existence any more and so rule 5 of Supreme Court was not attracted.

But the Supreme Court held by majority (Kapur J. dissenting) that Governor had no power to grant the suspension of sentence for a period during which the matter was subjudice in this court. The Governor's order suspending the sentence could only operate until the matter become subjudice in this court on the filing of the petition of special leave to appeal whereupon this court being in seisin of the matter could consider whether OXXXI, rule 5 should be applied on the petitioner exempted from the operation thereof as prayed for.

Sinha, C.J. speaking on behalf of majority said that if the power of the Governor under Article 161 could operate also while the Supreme Court is seized of the matter then both the executive and the judiciary have to function in the same field at the same time. Merely because one power is executive and the other judicial it be held that they do not act in the same field; the field is the same, namely suspension of the sentence passed on a convicted person.

He further said both the Articles 161 and 142 contain no words of limitation and the field covered by them are also unfettered. If there is any field common to both, the principle

of 'harmonious construction' will have to be adopted in order to avoid conflict between the two powers. The ambit of Article 161 is very much wider and it is only in a narrow field that the power contained in it is also contained in Article 142, namely the power of suspension of sentence during the period when the Supreme Court is seized of the matter and it is subjudice on the principle of 'harmonious construction' and to avoid conflict between the two it must be held that Article 161 does not deal with the suspension of sentence during the time Article 142 is in operation and the matter is subjudice.

The further contention that Rule 5 of O 21, framed under the rule making powers of the Supreme Court under Article 145 is only subsidiary legislation and so must yield to the powers under Article 161 is not correct.

The court further held that "the prerogative is no longer then the law allows" and was observed that in fact, we apprehend to entering into an elaborate discussion about the scope and effect of the said large power in the light of the relevant judicial decisions is likely to create confusion.

Kapur, J. in his dissenting opinion held that the word 'at any time' in Section 401, Cr.P.C. are very wide and show the plenary nature of the power. The powers of the Governor under Article 161 is of the widest amplitude as the words of the Article would show. In construing a constituent or an

organic statute as the constitution of India, that interpretation must be attached which is most beneficial to the widest amplitude of its power.

He further held that the history of pardons, reprieves etc. shows that the power of the executive in that sphere is of the widest amplitude, plenary in nature and can be exercised at any time after the offence - before or during trial, after judgment and before, during and after disposal of the appeal.

The said power is sought to be cut down by reference to Section 426, the appellate court can only suspend the sentence 'for reasons stated' no such limitation is placed in Section 401. The court acting judicially under Article 142, take only those facts into consideration which are sufficient in the judicial sense to justify the exercise of its power, so would be the case when the power is exercised under the rules of the court.

Kapur, J.[29] observed: I have had the advantage of reading the order proposed by my Lord the C.J., but I regret I am unable to agree with it and I proceed to give my reasons. In this petition which is brought for exemption from surrender to the sentence imposed on the petitioner a question of great constitutional importance arises. The petitioner submits that his sentence having been suspended by the order of the Governor of the erstwhile State of Bombay, the rule made by this court as

29. S.C.J. (1961) 11 p. 117.

to surrender which is a condition precedent to the hearing of a petition for leave to appeal against the judgment of the High Court is inapplicable to him and that it is a fit case in which he should be exempted from the operation of the rule.

However, this judgment was severely criticised by H.M. Seervai[30]. He said that the Supreme Court by majority, temporarily departed from the settled law relating to the pardoning power and from settled principles of construction, it could have been safely asserted that the law was well settled not only in England and America, but also in India. He called Nanavati case as an off-shoot of a sensational murder trial in Bombay which arosed great public interest and the same interest was arosed when Governor of Bombay suspended the sentence passed on Nanavati till the disposal by Supreme Court. He has quoted the words of Holmes J. saying that Nanavati case has also attained the dignity of 'great case'. "Great cases, like hard cases, makes bad law. For great cases are called great, not by reason of their real importance in shaping the law of the nature, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even

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30. Seervai, H.M. "Constitutional Law of India", p. 1755.

well settled principles of law will bend".[31]

It is submitted that the principle of harmonious construction was clearly misapplied, because the majority judgment created disharmony between two constitutional provisions where none existed. Before principle of harmonious construction can came into play, an attempt must first be made to see whether a conflict between two constitutional provisions is apparent or real.

In the same year and almost under the same bench another case Sarat Chandra Rabha[32], came before the Supreme Court to consider the opinion upon the executive's pardoning power. In this case the distinction drawn by Kapur J. in Nanavati case between executive and judicial control over sentences was affirmed. The facts of the case are as follows:

The appellant's nomination paper for election to the Assam Legislative Assembly was rejected by the Returning Officer on the ground of disqualification under Section 7(b) of the Presentation of People Act, 1951, in that he had been convicted and sentence to three years regrous imprisonment under Section 4(b) of the Explosive Substance Act (VI of 1908) and five years had not expired after his release. The appellant had applied to the Election Commission for removing the said disqualification

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31. Northern Securities Co. v. U.S.
32. Sarat Chandra Rabha v. Khagendragadker Nath (1961) 2 S.C.R. 133.

but it had refused to do so. The appellant sentence was however, remitted by the Government of Assam under Section 401 of the Criminal Procedure Code. And the period in which he was actually in jail was less then two years. The Election Tribunal held that the nomination paper had been improperly rejected and set aside the election but the High Court taking a contrary view dismissed the election petition.

The question before the court was whether the order of remission has the effect of reducing the sentence in the same way in which an order of an appellate or a revisional court has effect of reducing the sentence passed by the trial court to the extent indicated in the order of the appellate or revisional court.

The Supreme Court held that the legal effect of the judicial reduction of a sentence and an executive remission of that sentence was entirely different. It observed that the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of the conviction by the court and the sentence passed by it untouched.

The main contention on behalf of the appellant is that High Court was wrong in coming to the conclusion that the nomination paper of the appellant was properly rejected under Section 7(b) of the Act of Representation of People 1951.

Wanchoo J., who delivered the unanimous opinion of the court held that the term of the Section 7(b) were satisfied and

the appellant being a person convicted and sentenced to three years imprisonment was disqualified from contesting an election.

Wanchoo, J.[33] observed: "Now it is not disputed that in England and India the effect of a pardon or what is sometimes called a free pardon is to clear a person from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him as it were a new man but the same effect does not follow on a mere remission which stands on a different footing altogether.

The scope of Article 72 came up before the Supreme Court for determination in the infamous Billa-Ranga case[34]. The facts of the case are briefed as follows:

Kuljeet Singh (Ranga) and Jasbir Singh (Billa) hatched a plan that they would offer a lift in their car to some young children try to extort ransom from their parents by kidnapping them, and if their scheme ran into difficulties, to kill the children. The two children happened to be Gita and her brother Sanjay. On 26th August, 1978, in New Delhi they kidnapped these two Gita and Sanjay; children of naval officer and committed

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33. (1961) 2 S.C.R. 133.

34. Kuljeet Singh v. Lt. Governor of Delhi, 1981 A.I.R. S.C. 1572.

murders of both after committing rape on Gita Chopra. They were decoyed into a car under the pretext of giving them a lift; but once in the car, they resisted and cried out for help. A public spirited citizen gave chase, but the car broke through the traffic lights and escaped. They were brutally murdered by Ranga and Billa. They were tried for murder and District Judge sentenced them to death. The sentence was confirmed by High Court. Thereupon they presented a special leave petition to Supreme Court. The Supreme Court dismissed the appeal. Ranga and Billa had presented mercy petitions to the President to commute their death sentence.

While the petitions were pending Ranga presented a writ petition to the Supreme Court - Kuljeet Singh case[35], inviting the Supreme Court to reappraise his case and reconsider the dismissal of his special leave petition. Chandrachud, C.J. (for himself, A.P. Sen and Baharul Islam, JJ) held the accused were professional murderers and deserve no sympathy even in term of evolving standards of decency of a maturing society. Their inhumanity defied all belief and description. The death sentenced imposed upon them was, therefore, upheld. Chandrachud, C.J. expressed the hope that the President would dispose of the mercy petitions expeditiously.

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35. (1981) A.I.R. S.C. 1572.

Meanwhile the mercy of Ranga was rejected by the President. Upon this Kuljeet Singh filed a writ petition[36] contending that the power conferred by Article 72 on the President to grant pardons and to commute sentences, especially the sentence of death, was a power coupled with a duty which must be fairly and reasonably exercised. Chandrachud, C.J. observed that the court did not know whether the Government of India had formulated any uniform standard or guideline by which the exercise of the power under Article 72 was intended to be, or was in fact, guided.

The question raised by Mr. Garg for the petitioner was of "far reaching importance" and the petition was fixed for final hearing in the second week of January 1982. Meanwhile the execution of Ranga and Billa was stayed, and in order to obviate the necessity of persons. Similarly situated filing writ petitions, the court directed that "the death sentence imposed on any person whatsoever whose petition was rejected under Article 72 or 161 of the Constitution, should not be executed until the disposal of this writ petition".

Finally, however, when the writ petition[37] came before the bench for hearing on January 20, 1982, Supreme Court speaking through Chandrachud, C.J. (O. Chinnappa Reddy and

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36. Kuljeet Singh v. Lt. Governor of Delhi (1981), A.I.R. S.C. 2239.

37. A.I.R. 1982 S.C. 774.

A.P. Sen, JJ.) observed: In the instant case, since the accused had committed cold-blooded murders with professional stamp, the only sentence which could possibly be imposed upon him was that of death and no circumstances existed for interference with that sentence. It could not, therefore, be said that a refusing to commute the sentence of death into a lesser sentence, the President has in any manner transgressed his discretionary power under Article 72. Whatever be the guideline observed for exercise of the power conferred by Article 72. The question whatever the Government of India has formulated any uniform standard or guidelines by which constitutional power under Article 72 or 161 can be exercised left open, hence general order of stay of execution of death sentence is vacated.

It further observed that the present petition did not provide such occasion, because whatever be the guidelines observed for the exercise of such power conferred by Article 72 the only sentence which could possibly be imposed on Ranga was that of death and no circumstance existed for interference with such sentence. It is indeed encouraging that the "appropriate occasion" did eventually come and the court was not overawed by the victim of crime.

However, the observation of the court in this case and the stay of execution was criticised as it was wrong to have

given stay to the execution of death penalty of a convict like Ranga whose petitions had been earlier dismissed by the court not once but twice. The earlier observations of the court on 21st April, 1981, when it dismissed the writ petition of Ranga to the effect, "we hope that the President will dispose of the mercy petition stated to have been filed by the petitioner as expeditiously as he finds it convenient", were one can not help thinking pregnant meaning. Hence one feels that the story of execution granted on this background was perplexing. Decisions like these do not heighten the court's image.[38]

Some unusual features in this case are that the petitioner Kuljeet Singh was produced before the learned judges - a proceeding described by Chandrachud, CJ, himself as a somewhat "unusual exercise" and question on matters bearing on the question of sentence the answer given by the petitioner, the learned C.J. says, furnish no material at all for justifying the reduction of the death sentence to imprisonment for life. We do not know under what provisions of law the petitioner could be personally examined although we are told that counsels for the Government were present unless it was for elucidating any statement made in the petition.[39]

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38. Dheiryasheel v. Patil (President's Power to pardon and judiciary Cri. L.J. 1982 (AP) 88 Cri. L.J. p. 10).

39. President's power of pardon, Editorial 1981-82, 86 CWN p. 52.

Another unusual feature was allowing newspapermen to interview the condemned prisoners. The jail code of course allowed friends and relatives to see the condemned men for the last time to bid them farewell. Mr. J. Sen and Mr. Justice Baharul Islam are reported to have said that they did not see why newspapermen and journalist could not be termed as friends of society. We do not think the newspapermen wanted to see the prisoner to bid them farewell. They were then to regale their readers and to cater to the morbid curiosity of the masses for details of the operation. However, in the words of H.M. Seervai[40], if our reading of the judgment of Chandrachud, C.J. is correct, the judgment clearly reached the right conclusion.

The power to grant remission, commutation or suspension of sentences has been given to the government concerned under Sections 432 to 435 of the Code of Criminal Procedure, 1973. While doing so, the appropriate government may take into account the opinion of the judge who passed such a sentence but that is not obligatory nor is such an opinion binding on the government.

Wider powers have been given to the President by Article 72 of the constitution. However, more or less same powers have been given to Governors under Article 161 of the constitution. The power of the President under Article 72 of the constitution is not conflicting with the power of the concerned government

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40. H.M. Seervai, "Constitutional Law of India", Vol. IIa 1770.

under Sections 432-435 of the Criminal Procedure Code, 1973.

In Maru Ram case[41], it was contended that by the introduction of Section 433A[42], Section 432 is excluded for certain clauses of lifers and Section 433A suffers eclipse. Since Section 432 and 433A are statutory expressions and modus operandi of the constitutional power, Section 433A would be ineffective because it detracts from the operation of Section 432 and 433(a) which are legislative subbogates, as it were of the pardon under the constitution.

But the Supreme Court while speaking through Chandrachud, C.J. and Bhagwati and Krishna Iyer, JJ (Koshal, J. concurring) held that, although the power under Article 72 or 161 which is constitutional and that under 432 and 433(a), which is statutory, may be similar but they are not the same or identical. The two powers differ in their source, substance and strength. The constitutional power is untouchable and unapproachable and can not suffer the vicissitudes of simple legislative processes.

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41. Maru Ram v. Union of India, 1981 S.C.R. 107.

42. Section 433A - "Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonments for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

Therefore, Section 433A can not be invalidated as indirectly violative of Article 72 and 161. What the code gives, it can take, and so an embargo on Sections 432 and 433A is with the legislative power of the parliament.

The manner about the exercising of this power Chandrachud, CJ, observed : "In exercising this power the Governor or the President act and must act not on their own judgment but in accordance with the aid and advice of their Council of Ministers. But all public power, including constitutional power, shall never be exercisable arbitrarily, guidelines for fair and equal execution are guarantors of the valid play of power".[43]

According to the Supreme Court, petitions filed under Article 72 and 161 of the constitution or under Section 432 and 433 must be disposed of expeditiously. This was observed in Sher Singh case[44]. The facts of which in brief are as follows:

The petitioner Sher Singh and Surjet Singh and one Kuldip Singh were convicted under Section 302 read with Section 34 I.P.C. were sentenced to death by the learned Sessions Judge, Sangrur on November 26, 1977. By a judgment dated July 18, 1978, the High Court of Punjab and Haryana

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43. 1981 S.C.C. p. 115.

44. Sher Singh v. State of Punjab, 1983 A.I.R. S.C. 465.

reduced the sentence imposed upon Kuldip Singh to life imprisonment but upheld the sentence of death imposed upon the petitioner. The court dismissed the special leave petition filed by the petitioner on March 15, 1979. The petitioner then filed a writ petition in this court challenging the validity of 302 of I.P.C. that petition was dismissed on January 20, 1981. Review petition filed by the petitioner against dismissal of their special leave petition was dismissed by this court on March 27, 1981. After failing in these seemingly inexhaustible series of proceedings the petitioner filed these two writ petitions on March 1983, basing themselves on the decisions rendered by Justice Chinnappa Reddy and Justice R.B. Misra, on February 16, 1983, Vatheeswaran.[45]

Chandrachud, C.J., observed : "We must take the opportunity to impress upon the Government of India and the State Government that petitions filed under Article 72 and 161 of the constitution or under Sections 432 - 433 of Cr.P.C. must be disposed of expeditiously. A self imposed rule should be followed by the executive authorities rigorously that every such petition should be disposed of within a period of three months from the date on which it is received. Long and terminable delays in the disposal of these peitions are a serious hurdle in the dispensation of justice and indeed such

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45. Delay exceeding two years in the execution of sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death.

delays tend to shake the confidence of the people in the very system of justice.

A pernicious impression seems to be growing that whatever the courts may decide, one can always turn to the executive for defeating the verdict of the court by restoring to delaying tactics.

It was further said that delay in executing a death sentence is inquestionably an important consideration for determining whether death sentence should be allowed to be executed. But according to us, no hard and fast rule can be laid down as our learned breathren have done.

And finally question of the scope of Article 72 again came before the Supreme Court in Kehar Singh case[46]. The facts of which in brief are as follows:

On 22nd January, 1986, Kehar Singh was convicted of an offence under Section 120-B read with Section 302 of the Indian Penal Code, in connection with the assassination of Smt. Indira Gandhi, the then Prime Minister of India, on 31st October, 1984, and was sentenced to death by the learned Additional Sessions Judge, New Delhi. His appeal was dismissed by the High Court of Delhi, and his subsequent appeal by special leave to this court was dismissed on 3rd August, 1988. A review petition

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46. Kehar Singh v. Union of India, A.I.R. 1989, S.C. 653,

filed thereafter by Kehar Singh was dismissed on 7th September, 1988 and later a writ petition was also dismissed by this court.

On 14th October, 1988, his son Rajinder Singh presented a petition to the President of India, under Article 72 of the constitution. In that petition reference was made to the evidence on the record of the criminal case and it was sought to be established that Kehar Singh was innocent, and that the verdict of the courts that Kehar Singh was guilty was erroneous. It was argued that it was a case of clemency. The petition included a prayer that Kehar Singh's representative may be allowed to see the President in person in order to explain the case concerning him. The petition was accompanied by extracts of the oral evidence recorded by the trial court. On 23rd October, 1988, Counsel for Kehar Singh wrote to the President requesting an opportunity to present the case before him and for the grant of a hearing in the matter. A letter dated 31st October, 1988, was received from the Secretary to the President referring to the mercy petition and mentioning that in accordance with "the well established practice in respect of consideration of mercy petitions, it has not been possible to accept the request for a hearing". On 3rd November, 1988, a further letter was addressed to the President by Counsel refusing the existence of any practice not to accord a hearing on a petition under Article 72 and requesting him to reconsider his decision to deny a hearing on November 15, 1988, the Secretary to the

President wrote to Counsel as follows:

"Reference is invited to your letter dated November 3, 1988, on the subject mentioned above. The letter has been perused by the President and its contents were carefully considered. The President is of the opinion that he cannot go into the merits of a case finally decided by the highest Court of the land. Petition for grant of pardon on behalf of Shri Kehar Singh will be dealt with in accordance with the provisions of the Constitution of India".

Thereafter the President rejected the petition under Article 72. On 24th November, 1988, Kehar Singh was informed of the rejection of the petition. His son Rajinder Singh, it is said, came to know on 30th November, 1988, from the newspaper media that the date of execution of Kehar Singh has been fixed for 2nd December, 1988. The next day, Ist December, 1988, he filed a petition in the High Court of Delhi praying for an order restraining the respondents from executing the sentence of death, and on the afternoon of the same day the High Court dismissed the petition. Immediately upon dismissal of the petition, Counsel moved to the Supreme Court and subsequently filed special leave petition in the court along with writ petition no. 526-27 of 1988 under Article 32 of the Constitution.

During the preliminary hearing late in the afternoon of the same day i.e. Ist December, 1988, the Supreme Court

decided to entertain the writ petition and made an order directing that the execution of Kehar Singh should not be carried out meanwhile.

The questions that came up for determination by the court in Kehar Singh's case were:

1. Could the President under Article 72 of the constitution go into the merits of the case finally decided by the court?

2. Whether judicial review extends to an examination of the order passed by the President under Article 72 of the constitution?

3. Whether an oral hearing should be offered to the petitioner while the President is exercising his powers under Article 72?

4. What are the guidelines to be followed for regulating the exercise of this power under Article 72 in order to prevent an arbitrary exercise of power?

5. The constitutional validity of the death sentence.

The Supreme Court was of the view that pardon is a part of the constitutional scheme and it should be treated so in the Indian Republic. It has been reposed by the people through the constitution in the Head of State and enjoys a high status. It is open to the President in exercise of the powers vested in him by Article 72 to scrutinize the evidence on record of the criminal case and come to a different conclusion from that

recorded by the court in regard to the guilt and the sentence imposed on the accused. In doing so, the President does not amend or modify or supercede the judicial record. The judicial record remains intact and undisturbed. The President acts on a wholly different plane in which the court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as extension of it. And this is so, notwithstanding the practical effect of the presidential act to remove the stigma of guilt from the accused or to remit the sentence imposed on him.

The power under Article 72 entitle the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power "notwithstanding that it has been judicially concluded by the consideration given to it by this court".

With regard to the second question, the court made it clear that the question was only confined to the area and scope of the President's power and did not extend to whether the power had been truly exercised on merits. It has been held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the courts by way of judicial review.

Although it was categorically stated that the court was not going into the question as to whether the President's power had been truly exercised on the merits, it did observed that "we think that the order of the President cannot be subjected to judicial review on its merits except within the defined limitations".

The question whether an oral hearing should be extended by the President while exercising his power under Article 72. It was held that the matter lies entirely at the discretion of the President and the condemned person has no right to insist on an oral hearing before the President. The proceeding before the President is of an executive character and it is for the petitioner to submit all requisite information to the President for disposal of the petition. The President may consider sufficient all the material placed before him or he may send for further material relevant on the issue if he thinks it is pertinent and he may give an oral hearing to the parties if he considers it will assist him in dealing with the petition. In other words it is for the President to decide how best to acquaint himself with all the information necessary for a proper and effective disposal of the petition.

About the question of guidelines to exercise the power under Article 72, the court held that it seems to us that there is sufficient indication in the term of Article 72 and in the

history of the power enshrined in that provisions as well as existing case law, and specific guidelines need not be spelled out. Indeed it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines,for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and catagories of cases with facts and situations varying from case to case in which the merits and reasons of state may be profoundly assisted by prevailing occasions and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.

As the constitutional validity of the death sentence was upheld in Bachan Singh case[47], the court felt bound by the earlier decision point. It, therefore, declined to open the question again although great emphasis was laid on the dissenting judgment given by Justice Bhagwati in Bachan Singh's case.

The judgment has set to rest doubts raised by the President that his decision on a matter finally decided by the highest court of land would be construed as a conflicting action between the executive and judiciary.

As President expressed his opinion that he cannot go into the merits of the case finally decided by the highest court of land.

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47. Bachan Singh v. State of Punjab, 1983, AIR SC 465.

The Supreme Court expressed the view that it is open to the President in the exercise of the power vested in him by Article 72 of the constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion.

The constitutional bench decision, however, still left the doors of debate open to the question of the government's guidelines, if any, by which the constitutional power under Article 72 can be exercised though it has held it to be of far reaching importance, when it considered the Billa-Ranga case in 1981.

A cross-section of eminent jurists interviewed, said that they had no knowledge of any guidelines but had various suggestions to make. The majority of them were of the opinion that since the power of pardon is executive, the government which recommends mercy to President could take into consideration a variety of factors not judicially tenable, like 'public opinion' against an execution.[48]

The Supreme Court advocate, Mr. Venogopal, Senior Counsel Mr. Ram Jethmalani, constitutional expert Dr. L.M. Singhvi concurred on this aspect. However, a noted jurist Mr. Y.S. Chitale voiced his dissent on the issue of public opinion playing a part in the considerations.

According to the British Home Office which deposed before the Royal Commission on capital punishment whose subsequent

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48. Times of India, December 24, 1988.

exhaustive report of 1949-53 led to the abolition of death penalty, there are three 'rare' clashes of case in which reprieve may be granted. The report said that there had been occasional cases in British when it had been felt right to commute the sentence of death in deference to a widely spread or strong local expression of public opinion on the ground it would do more harm than good to carry out the sentence, if the result was to arose sympathy for the offender and hostility to the law".

Kehar Singh's Counsel Mr. Ram Jethmalani, said commutation of death sentence on the basis of strong public opinion was a well known ground in countries the world over. Constitutional expert Mr. Y.S. Chitale is of the view that evidence which had not been considered by court and had surfaced later should be considered as vital ground for commutation. He disagreed with the view of public opinion as 'an accused cannot be freed just on the basis of public opinion'.

In other misunderstandings of President's own power which was evident from the letter, and Mr. Jethmalani wanted the Supreme Court to clarify was that there was a "well established practice of not hearing petitioners by the President. Even on facts, this statement was wrong. When Vijaya Laxmi Pandit was Governor of Maharashtra, an eminent industrialist named Bhaiprasad Dial Das was convicted whereupon she sought a hearing, the Governor than appointed two Secretaries

to hear him. After the hearing the convict was pardoned. Many others might have gone to the gallows since then labouring under the same misconception which the President himself was harbouring. But ignorance of one's rights on the neglect to invoke them, would not make a well established practice".

The Supreme Court, while ruling that the convict had no right to insist on presenting oral arguments granted that President had wide power in choosing the manner of consideration of mercy petition. It is for him how best he can acquaint himself with all the information that is necessary for its proper and effective disposal.

C H A P T E R - III

JUDICIAL PRONOUNCEMENT

UNITED STATES JUDICIAL ATTITUDE

Section 2, Clause 1 of the United States Constitution provides that "the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment".

Pardoning power of the President of America has been held to be governed by the same principles as are applicable to the exercise of the king's power of mercy under the English Constitution.

In United States v. Wilson[1], Marshall, C.J., referring to the exercise of this power said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our and whose judicial institutions ours bears a close resemblance; we adopt their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it".

Similar words were said by Wayne, J., in Ex Parte Well.[2] He said: we still think so and that the language in the constitution, conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the

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1. 8 L. ed. 640 at 643-44.

2. 15 L. ed. 421 at 424.

time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as the Chief Executive. Prior to the revolution, the colonies being in effect under the laws of England, were accustomed to the exercise of it in the various forms as they may be found in English books. They were, of course, to be applied as occasions occurred and they constituted a part of the jurisprudence of Anglo-America. At that time of the adoption of the constitution, American Statemen were conversant with the prerogatives exercised by the Crown. Hence when the words to grant pardons were used in the constitution, they convey to the mind the authority as exercised by the British Crown, or its representatives in the colonies. At that time both Englishmen and American attached the same meaning to the word 'pardon'. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

This view that pardon must be given the same meaning as was given to it in England and America when the constitution was established was again affirmed in Ex Parte Grossman.[3]

Taft, C.J., said: The language of the constitution can not be interpreted safely except by reference to the common law and to British institutions as they were when the instrument

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3. 69 L. ed. 527 at 530, 532 and 535.

was framed and adopted. The statesmen and layers of the convention, who submitted it to the ratification of the convention of the thirteen states, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of Governments recent and ancient and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law confident that they could be shortly and earnestly understood".

The pardon except the pardon by statute has to be pleaded and the plea of 'not guilty' at trial would be taken as a waiver of the pardon.[4] Further under the prerogative, a sentence of death is commuted to one of transportation or imprisonment through the machinery of a conditional pardon.

In America for the first time the question arose that whether the aceeptance of pardon is necessary or not. U.S. v. Wilson[5], Marshall, C.J., held that the acceptance of a pardon was necessary for its validity. He described the pardon as the private though official, act of the executive magistrate, delivered to the individual for whose benefit it was intended

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4. Halsbury, Vol. 10 p. 404

5. 1833 7 Pet. 150, 8 L. ed. 640, 644.

and not communicated officially to the court, of which therefore, it will take no notice, for a court only looks with judicial eyes and can take no notice judicially of what is not before it. If pardon is rejected by the person to whom it is tendered "we have discovered no power in a court to force it in on him".

In Burdick v. U.S.,[6] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally.[7] Burdick having declined to testify before a Federal Grand Jury on the ground that his testimony would tend to incriminate him, was proferred by President Wilson "a full and unconditional pardon for all offences against the United States" which he might have attempted or participated in, in connection with the matter he had been questioned about. Burdick refused to accept the pardon and refused to testify before the Grand Jury. The Supreme Court upheld his right to do so. McKenna J. remarking "the grace of pardon may be only in pretense involving consequences of even greater disgrace than those from which it purports to relieve. However, Holmes, J., upheld the right of the President to commute a sentence of death to one of life imprisonment, against the will of prisoners. He said : A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When

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6. 1914, 236 U.S. 79, 59 L. ed. 476.

7. Corwin, p. 407.

granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.[8]

The power of the U.S. President to grant reprieves and pardons for the offenses against the United States except in cases of impeachment was sufficiently clear to require little or no interpretation, however, the questions of some importance have arisen taken the form of other aspects.

As in Biddle v. Perovich[9], the question arosed that can a Federal convict be pardoned without his consent? In this case the convict, Perovich, having been sentenced to death for murder in Alaska, was granted executive clemency by President Taft in 1909 and his sentence commuted to imprisonment for life. He was transferred from the Alaska Jail to the Federal Penitentiary at Leavenworth. After twice applying for a pardon which was denied, he secured a writ of habeas corpus on the ground that his removal to the Penitentiary was illegal since his consent.

The Supreme Court held that the consent of the prisoner was not an essential part of any change in sentence under the President's pardoning power. The President acts for the public welfare and interest regardless of the wishes of the convict.

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8. Biddle v. Perovich (1926) 274, U.S. 71 L.ed.

9. 274, U.S. 480, 1927.

If Perovich did not accept the change of punishment from hanging to imprisonment he could not get himself hanged against the executive order for imprisonment.

In another case of Garland Chapman, a bandit with a considerable local reputation in East. While under sentence at Atlanata for a federal offense, he escaped and was engaged with a companion in the robbery of a store in Connecticut when discovered by a watchman. The latter was shot and killed. On evidence that Chapman had fired the short, he was arrested but raised the question of could the State of Connecticut hold him as against the prior claim of the Federal Government for his imprisonment at Atlanta? President Coolidge cut the legal task by pardoning Chapman for the federal offence thereby clearing the way for his prosecution for murder by the Connecticut authorities. Chapman claimed that he could not be pardoned without his consent. The court ruled as in the Perovich case that the consent of the convict not being necessary, the Federal Government could lawfully, upon notice of his pardon relinquish him to the custody of the Connecticut authorities. This was done, and upon trial he was convicted and executed.

Can the President pardon for contempt of Court? The Supreme Court in Ex Parte Philip Grossman[10] decided in the affirmative. In this case Grossman sold liquor in violation of

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10. 69 L. ed. 527.

National Prohibition Act. A federal district judge issued an order enjoining Grossman from selling any more liquor. Two days later Grossman violated the order and was thereupon found guilty of contempt of court. He was sentenced to one year imprisonment and fined one thousand dollars. The President pardoned Grossman on the condition that the fine be paid. But the District Judge refused to recognise the pardon. He contended that the President's pardoning power extends only to offences against the United States. Since Grossman was being punished for a violation of a Judge's restraining order rather than for a violation of the National Prohibition Act, only the offence against the judiciary was involved. In short a contempt of court does not fall in the category of offenses against the United States.

The Supreme Court after a thorough review of the President's power precedents, found that there was no limit to the pardoning power of the President except in cases of impeachment.

There is no conflict between the judicial power to pass a sentence and the executive power to pardon it. Because the jurisdiction of a court to try an accused is nothing more than its obligation to decide a matter formally placed before it for the determination.

In U.S. v. George Wilson,[11] Marshall, J., stated as follows: "It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially".

In Ex Parte Grossman[12] the court said that administration of justice by the courts is not necessarily or always wise or considerate of circumstances which may mitigate a guilt and it order to remedy this. It was thought necessary to vest this in some other authority than the court to ameliorate or avoid particular criminal judgments. The exercise of this power has the effect of destroying the deterrent effect of judicial punishment. The extent of the two powers, judicial and executive and the difference between the two has been pointed out.

The classic statement of that distinction is that of Sutherland, J., U.S. v. Benz.[13] Benz was sentenced by a court to one year's imprisonment. While he was serving his sentence, he applied to the court to reduce his sentence which the court did by reducing it to one of six months imprisonment. U.S. Supreme Court upheld the power and Sutherland J, repelled the contention that it constituted an invasion of the executive

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11. 8 L. ed. 640 at 643.

12. 69 L. ed. 527 at 530, 532-535.

13. 75 L. ed. 354.

power of pardon by saying.

The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

Hence to conclude, it is clear that in U.S. the attitude of the courts with regard to pardoning power of the President is similar with that of king's prerogatives of mercy in England. The courts in America have recognised this power to pardon as executive, distinguishing it from judicial power. Because judicial power is exercisable on judicial considerations the courts would approach every question in regard to suspension with judicial eye. They are unable to look to anything which is outside the record or the facts which are proved before them. As it is not their sphere to take into consideration anything which is not strictly judicial. It is proved beyond doubt through the courts that there is no conflict between to pass a sentence judicially and to pardon it executively.

INDIAN JUDICIAL ATTITUDE

Indian judiciary is also like that of United States and England adopting the new principles in order to give the real meaning to the wording of constitutional provisions. It is the duty of the judiciary to interpret the constitutional provisions in such a way that the intention and object of constitution makes be fulfilled. So to get the real and crystalized meaning of the provision even it changes its earlier attitude and decisions to the fullest possible limit and periphery.

Indian judiciary has tried its best to achieve object and give full meaning to the constitutional provisions within the provisions of constitution for that it has imported some principles from the U.S. and England also.

As with regard to the law of pardon contained in Article 72 and 161 of the constitution giving powers to the President and Governors of the State respectively, the Supreme Court did not remained static in its attitude. It changed its attitude with the times and changing circumstances. And like that of U.S. Supreme Court it has adopted the attitude of distinguishing the judicial and executive powers with regard to punish and pardon and held in various cases that

judicial and executive considerations are different to decide the matter placed before it.

Nanavati's case[14] wasthe first case where the Supreme Court got the opportunity to express its opinion on the pardoning power of the executive. In this case the Governor of Bombay had suspended the sentence passed on Nanavati till the disposal of his appeal to the Supreme Court on the condition that he will remain in naval custody in which he had been kept upon that time. On appeal to Supreme Court it was held that the order of Governor was constitutionally invalid from the Supreme Court was seized of the matter, since it conflict with the power of the court under Article 142 of the constitution.

The Supreme Court applied the rule of harmonious construction. Sinha, C.J., who delivered the opinion of the court held that Articles 161 and 142 contain no words of limitation and the field covered by them are also unfettered. If there is any field common to both, the principle of harmonious construction will have to be adopted in order to avoid the conflict between the two powers. On the principle of harmonious construction and to avoid between the two powers it must be held that Article 161 does not deal with the suspension of sentence during the time Article 142 is in operation and the matter is subjudice.

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14. K.M. Nanavati v. State of Bombay, AIR 1961, SC 113,114.

However, Kapur, J., dissenting opinion is much convincing holding that the power to suspend a sentence was a part of the pardoning power which could be exercised at any time and which did not conflict with the power of the court because the executive and judicial control over sentences is governed by distinct and different considerations.

He further observed that the history of pardons, reprieve etc. shows that the power of the executive in that sphere is of the widest amplitude, plenary in nature and can be exercised at any time after, the offence before or during trial, after judgment and before during and after disposal of the appeal.

So to say that the power of the executive to suspend the sentence under Article 161 and of the judiciary under Article 142 or in conflict is to ignore the nature of the two powers and the different considerations for their exercise.

However, the ephemeral attitude of the Supreme Court as the majority judgment of the Nanavati's case fortunately could not remain as law for long. And the indelible opinion forming the minority judgment of Kapur, J., was accepted and confirmed in the same year and almost by the same bench in the Sarat Chandra's case[15]. In this case the Supreme Court came on its normal route and recognised the fact historically established

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15. (1961) 2 S.C.R. 133.

which was also the opinion of Kapur, J., in Nanavati's case that the legal effect of the judicial reduction of a sentence and an executive remission of that sentence was entirely different.

Wanchoo, J., while delivering the judgment of the court held that an order of remission thus does not in any way interfere with the order of the court; it affect only the execution of the sentence passed by the court and frees the convicted person from his liability. The power to grant remission is executive power and can not have the effect of which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by appellate or revisional court.

Supreme Court relied upon the U.S. v. Benz[16] and observed that the judicial power and executive powers over sentences are readily distinguishable as observed J. Sutherland. "To render a judgment is a judicial function, to carry the judgment into effect is an executive function. To cut short a sentence by or act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua, judgment".

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16. Supra n. 13 at p. 80

Hence the Supreme Court attitude in Nanavati's case changed in this case and principle that there is no conflict between judicial and executive powers over sentences as they are readily distinguishable.

In Kuljeet Singh's case, the President rejected the mercy petitions of Ranga and Billa. Ranga, thereupon filed a writ petition in the Supreme Court. It was argued that power conferred by Article 72 on the President to grant pardon and commute sentences was a power coupled with a duty which must be fairly and reasonably exercised. The Supreme Court observed that court did not know whether Government of India had formulated any uniform standard or guidelines under which Article 72 was guided or intended to be guided.

However, in this case, the dicta in Ex Parte Philip Grossman[16a] was approved and adopted. Where C.J., Taft explained: 'Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy it has always been thought essential in popular governments, as well as in monarchies to vest in some other authority that the courts power to

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16a. 1924, 267 U.S. 87: 69 Law ed. 527.

ameliorate or avoid particular criminal judgments ....".

Chandrachud, C.J., further observed that the President's power may have to await examination on an 'appropriate occasion'. He further observed that present petition did not provide such occasion, because whatever be the guidelines observed for the exercise of such power conferred by Article 72, the only sentence which could possibly be imposed on Ranga was that of death and so no circumstances existed for interference with such sentence. It is indeed encouraging that the 'appropriate occasion' did eventually come and the court was not overawed by the victim of crime.

However, the reference to the judgment of Chief Justice Taft in Ex Parte Grossman shows that the court realized that familiar argument about uniform standards or guidelines was inapplicable to the power of pardon. Rightly Chandrachud, C.J., after citing the Grossman case observed that the necessity or justification of exercising the pardoning power had to be judged from case to case. After all the power was used for reducing and not enhancing the sentence.

In this case the Supreme Court recognised the observation of Grossman case, that administration of justice by courts is not always necessarily wise or certainly considerate of circumstances which may properly mitigate guilt and this pardoning power is a check entrusted to the Executive for special cases to exercise it to the extent of destroying the deterrent

effect of judicial punishment.

In Maru Ram's case,[17] it was contended that by the introduction of Section 433A, Section 432 is excluded for certain classes of lifers and Section 433(a) suffers eclipse. Since Section 432 and 433(a) are statutory expressions and modus operandi of the constitutional power Section 433A would be ineffective. But Supreme Court rejected the contention and held although power under Article 72 and 161 which is constitutional and that under Section 432 and 433(a), which is statutory, may be similar but they are not the same or identical. The two powers differ in their source, substance and strength. It was further held that constitutional power is untouchable and unapproachable and can not suffer the vicissitudes of simple legislative process. Therefore, Section 433A can not be invalidated as indirectly violative of Article 72 and 161.

In this case the Supreme Court held that in exercising the power under Article 72 and 161, President and Governor act and must act not on their own judgment but in accordance with the aid and advice of their council of ministers. Court further adviced all public power including constitutional power shall never be exercisable arbitrary or malafide and ordinarily, guidelines for fair and equal execution are guarantors of the

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17. Maru Ram v. Union of India, 1981 S.C.C. 107.

valid play of power.

In Sher Singh case,[18] the petitioner contended that delay in execution of sentence of death exceeding two years entitles the person under sentence of death to demand quashing the sentence and converting it into sentence of life imprisonment. He based his contention on the decision in Vatheeswaran[18a] case where it was held that delay exceeding two years in the execution of death sentence should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence.

Chandrachud, C.J., held that delay exceeding two years in the execution of death sentence itself does not entitle the person under the sentence to demand converting it into sentence of life imprisonment. Chandrachud, C.J., instructed the Government of India and State Governments that petitions filed under Article 72 and 161 of the constitution or under Ss. 432-33 of Cr.P.C. must be disposed of expeditiously. A self imposed rule should be followed by the executive authority rigorously that every such petition shall be disposed of within a period of three months, from the date on which it is received. He observed that long and interminable delays in the disposal of these petitions are a serious hurdle in dispensation of justice.

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18. A.I.R. 1983 S.C. 465.

18a. A.I.R. 1983 S.C. 261.

In this case it was held that there is no hard and fast rule as it was laid down in Vatheeswaran case. But it can be a unquestionably important consideration for determining whether death sentence be converted into a life sentence. Hence Vatheeswaran case was overruled in this decision.

Earlier in Kuljeet Singh's case,[19] the Supreme Court observed that scope of President's power as regards this Article 72 may have to await examination on an 'appropriate occasion'.

In Kehar Singh's case[20], the Supreme Court has now seized the occasion by making it clear that the President has complete discretion in exercise of this power. It was expressed that having regard to the seriousness of the controversy we have considered it appropriate to pronounce the opinion of this court on the questions. The Supreme Court in this case observed that power to pardon is a part of constitutional scheme and it should be so treated in the Indian Republic. It has been reposed by the people through the constitution in the head of the state and enjoys high status. The power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 72(1) must act in accordance with such advice.

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19. Supra n. 34 at p. 54.

20. Kehar Singh v. Union of India, AIR 1989 SC 653.

It was observed that it is open to the President in the exercise of the power vested in him by Article 72 of the constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court, in regard to the guilt of, and sentence imposed on the accused. In doing so the President does not amend or modify or supersede the judicial record. The judicial record remain intact and undisturbed. The President acts in a wholly different plane from that in which the court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and can not be regarded as an extension of it. Court in this case cited the observation of Sutherland in U.S. v. Benzen[21] that "the judicial power and executive power over sentences are readily distinguishable ...."

As with regard to the judicial review it was observed that order of the President can not be subjected to judicial review on its merits except within certain limitations. However, the function of determining whether the act of constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the fail amplitude of the scope of the power is a matter for the court.

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21. Supra n. 13 at p. 80.

The courts are the constitutional instrumentalities to go into the scope of Article 72 but can not analyse the exercise of power under Article 72 on its merit. The question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.

It was also urged that in order to prevent an arbitrary exercise of power under Article 72 this court should draw up a set of guidelines for regulating the exercise of this power. But the court observed that there is sufficient indication in terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. It was expressed by the court that it may not be possible to lay down any precise, clearly defined and sufficiently channelized guidelines, for we must remember that the power under Article 72 is of the widest amplitude can contemplate a myriad kinds and catagories of cases with facts and situations varying from case to case in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time. And it is of great significant that function itself enjoys high status in the constitutional scheme.

But the judgment is not without some disappointing features. As to those who consider capital punishment as intrinsically evil

the judgment must be appaling. The court declined to reverse its previous ruling upholding the constitutionality of capital punishment on the ground that under the present criminal law death sentence is an exception to be meted out in the rarest of rare case and the statistics showed that between 1974 to 1978 when 85,000 murders were committed only 29 persons were hanged.[22]

The altitude of the court in this remain the same rather it has confirmed the judgment of Kuljeet Singh's case. The vital point in this judgment is that it has not ruled out judicial review even though the power under Article 72 is of widest amplitude and can contemplate a myriad kinds and catagories of cases.

In the words of Soli J. Sorabjee[23] one may rightly regard this judgment as the high water mark of judicial review, a basic feature of our constitution.

It is not clear whether the court has ruled out the giving of reasons by the President in all cases or only in Kehar Singh's case because of its observation that there is no question in this case of asking for the reasons for the President's order. To support a decision by stated reasons in considered the hallmark of good and fair government, our Supreme Court has gone further and considers it a requirement on natural justice.

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22. The Times of India, January 2, 1989
23. Ibid.

The Supreme Court of India by its judgment in this case has vindicated its reputation as the sentinal on the qui vive for anyone seeking its protection. However, in criticism it can be said that court did not instructed to the Executive any specific guidelines for the exercise of the power under Art. 72.

If the President is not aware of his constitutional right how fairly he can exercise his power is doubtful. As on 15th November, 1988, the Secretary to the President wrote to Counsel of Kehar Singh as follows:

"Reference is invited to your letter dated Nov. 3, 1988, on the subject mentioned above. The letter has been persued by the President and its contents carefully considered. The President is of the opinion that he can not go into the merits of a case finally decided by the Highest Court of the land".[24]

Whereas the Supreme Court is of the opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this court.[25]

So either the President must have sought the advice from the Supreme Court before rejecting the mercy petition of Kehar Singh or while exercising the power of judicial review the court must have advised the President that he should reconsider the mercy petition while knowing that he has the right to go into the merits of the case.

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24. A.I.R. 1989 p. 656.
25. A.I.R. 1989 S.C. p. 659.

COMPARISION OF ATTITUDE

Before comparing the attitude of courts in India and U.S. one thing should be kept in mind that the constitution of United States is centuries older than that of India. Therefore, it is obvious that more principles and attitude might be adopted by the Indian courts. As both the constitutions provided for the provision of pardon which is to be exercised through the executive head of state. But neither the word pardon nor the manner in which it is to be exercised have been defined in any constitution. So it remained the function of judiciary how to interpret it to get the desired result for which the provision regarding the pardoning power is contained in the constitution. While going through the cases decided by the apex courts of both the countries, India and U.S. and after comparing we will find much similarity than clash. There may be differences regarding some aspects but in general courts in both the countries interpreted the provisions regarding pardoning power almost on the same footing.

U.S. Supreme Court in the case of Wilson defined the pardon as an act of grace proceeding from the power entrusted with the execution of the laws, which exempts an individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official,

act of the executive magistrate, delivered to the individual for whose benefit it is intended and not communicated officially to the court. But the same court after a long period changed its attitude and in Perovich case[26] it was said that pardon is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of ultimate authority that the public welfare will be better served by inflicting what the judgment fixed.

In India the court if not directly said this power as a constitutional scheme even than in Re-Channugadu[27] case Madras High Court recognised this while in another manner. It said that our country is now a sovereign republic and in many aspects the power of pardon and reprieve conferred on the President and Governors is very similar to the power of President of U.S. in granting pardon and reprieve. The wording of the corresponding articles is also similar and such being the case decisions of the U.S. Supreme Court are useful in the decision of this point.

A comparision of the language of these Articles 72 and 161 with Section 2 of Article II of U.S. constitution will show the similarity between them. It, therefore, can be gathered that President of U.S. can grant a pardon before conviction it

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26. Supra n. 9 at p. 77.

27. Supra n. 22 at p. 43.

stand to reason that appropriate authority in India exercising power under similar provisions must have that power.

In Benz case[28], U.S. Supreme Court while upholding the validity of reduction of sentence by court from one year to six months, supreme court made a clear distinction between executive and judicial power and observed that judicial and executive powers are readily distinguishable. To render judgment is a judicial function to carry the judgment into effect is an executive function .... To reduce a sentence by amendment alters the terms of the judgment itself is a judicial act as much as the imposition of the sentence in the first instance.

Similar views were expressed by the courts in India as if pardon is given after sentence, there is no conflict either, for to pass a sentence is a judicial function, governed by judicial considerations, to pardon a sentence is an executive function governed by consideration rather than judicial as mercy or policy.

Madras High Court in re-Chennugadu[29] case cited the above mentioned passage with approval and observed that the release of the prisoners condemned to death in exercise of powers conferred under Section 401 Cr.P.C. and Article 161 of the constitution does not amount to interfere with the due and

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28. Supra n. 13 at p. 80.

29. Supra n. 22 at p. 43.

and proper course of justice as the power of this court to pronounce upon the validity propriety and correctness of the conviction and sentence remained uneffected.

But in Nanavati case[30] the attitude of Supreme Court of India was otherwise as the Supreme Court could not make such a distinction and observed that there is conflict between the executive and judicial power over a sentence because both the articles 161 and 142 contain no words of limitation and the field covered by them is also unfettered. So in order to avoid the conflict court adopted the principle of harmonious construction.

However, Kapur, J. in his minority judgment approved the distinction between executive and judicial power over a sentence and held that there is no conflict between both these powers. He further observed that history of pardons reprieve etc. shows that the power of the executive in that sphere is of the widest amplitude, plenary in nature and can be exercised at any time after the offence - before or during trial, after judgment and before during and after disposal of the appeal.

In Sarat Chandra Rabha case[31], the Supreme Court in the same year affirmed the minority judgment of Nanavati case meaning thereby that the distinction made in Benz case was

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30. Supra n. 28 at p.47.

31. Supra n. 15 at p. 84.

approved by the Indian apex court and was observed that now it is not disputed that in England and India the effect of pardon or what is sometimes called a free pardon as to clear a person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualification. But the same effect does not follow on a mere remission which stands on a different footing. As an order of remission thus does not in any way interfere with the order of the court, it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission in executive power and can not have the effect of which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court.

The court in this case cited the classical statement made by Sutherland, J., in Benz's case[32] decided by U.S. Supreme Court distinguishing executive and judicial power over sentence.

The question as what is the attitude of U.S. and Indian courts regarding the affect of pardon. In Ex P. Garland case[33]

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32. Supra n. 13 at p. 80.
33. 4, Wallace 333 (1867).

it was observed by the U.S. Supreme Court that the inquiry arises as to the effect and operation of a pardon and on this point all authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender and when the pardon is full it releases the punishment and blot out of existence the guilt so that in the eye of law the offender is as innocent as if he had never committed the offence, and if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights.

Supreme Court of India in Rabha case[34] deciding that High Court was right in holding that appellant was disqualified under Section 7(b) of representation of People Act and his nomination paper had been rightly rejected, approved the above U.S. ruling that full pardon reaches the punishment blot out the existence of guilt and the offender becomes as innocent as if he had never committed the offence and this pardon restores him all the civil rights.

In Grossman case[35] another exposition of law was found by U.S. Supreme Court where it was said that executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. It was said that administration of justice is not always wise or certainly considerate of circumstances which may properly

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34. Supra n. 15 at p.84.
35. 69 L. ed. 527 at 530,532,535.

mitigate guilt. To afford a remedy it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.

In Kuljeet Singh[36] case where it was contended that President under Article 72 has wrongly rejected the mercy petition of the petitioner. The Supreme Court while rejecting the contention held that we see no justification for saying that in refusing to commute the sentence of death imposed upon the petitioner into a lesser sentence the President has in any manner transgressed his discretionary power under Article 72. Undoubtedly, the President has the power in an appropriate case to commute any sentence imposed by a court into a lesser sentence. The court then quoted that "executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of criminal law" and said that whether the case is appropriate for existence of power conferred by Article 72 depends upon the facts and circumstances of each particular case and necessity therefore is to be judged from case to case.

It was further observed in this case that court did not know whether the government of India had formulated any uniform standard or guidelines under which Article 72 was guided or

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36. Supra n. 34 at p. 54.

intended to be guide. Whatever be the guidelines observed for the exercise of such power conferred by Article 72, the only sentence which could possibly be imposed on Ranga was that of death and no circumstances existed for interference with such sentence. In this case it is indeed encouraging that the 'appropriate occasion' did eventually come and the court was not overawed by the victim of crime.

However, the reference to the judgment in Grossman shows that the court has realized that the familiar argument about uniform standards or guidelines was inapplicable to the power of pardon.

In Garland case it has been held that the power of pardon is not subject to legislative control nor is open to legislature to change the effect of pardon. The executive may grant pardon for good reason or bad or for any reason at all its act is final and irrevocable. The court have no power and concern with the reasons which actuated the executive. This power is beyond the control of judiciary. This view was affirmed in U.S. v. Klein case.[37]

In Ex Parte United States[38], Supreme Court on a writ of mandamus in which judges suspended indefinitely the sentence they had pronounced while justifying their action the judges

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37. (1871) 13 Wal 128, 147, 20 L. ed. 519, 526.
38. (1916) 242 U.S. 27, 46, 61 L. ed. 129.

referred to the character of the accused, the circumstances of the crime and to their conviction that if the sentence were suspended, the accused would be reclaimed as useful member of society. The power to suspend the sentence was supported as an inherent judicial power.

Supreme Court negatived an inherent judicial power, it observed that it was for legislature to fix and determine the punishment for crime, including circumstances which can be taken into account as a matter of judicial discretion, it was for judiciary to award punishment according to law and it was for executive to relieve from the punishment fixed by law.

In India the question whether judicial review extends to an examination of the order passed by the President under Article 72 of the constitution came before Supreme Court in a recent case of Kehar Singh[39], the court observed that we are only confined to the area and scope of the President's power and did not with the question whether the power had been truly exercised on merits. It has been held that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the courts by way of judicial review. Court further observed although it was catagorically stated that the court was not going into the question as to whether the President's power

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39. Supra n. 47 at p. 69.

had been truly exercised on the merits, it was observed that "we think that the order of the President can not be subjected to judicial review on its merits except within the defined limitations".

Now the question is as what are the strict limitations. Court referred the Maru Ram case[40] and cited the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power or is vitiated by self denied on an erroneous appreciation of full amplitude of the power is a matter for the court.

In State of Rajasthan v. Union of India,[41] Supreme Court held that so long as question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it will be its constitutional obligation to do so .... This court is the ultimate interpreter of the constitution and to this court is assigned the delicate task of determining what is the power conferred on each branch of government. Whether limited or not if limited whether it has transgressed its limits. It is for the court to uphold the constitutional limitations. That is the essence of Rule of Law.

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40. In this case it was held that if the consideration or occasion for the exercise of President power be wholly irrelevant, irrational, discreminatory or malafide the court will examine the exercise of power in those rare cases.

41. (1978) 1 SCR p. 80-81.

Again in Minerva Mills Ltd. v. Union of India[42], Bhagwati, J., said : "The question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the state and whether such limits are transgressed or not ... The constitution has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review".

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42. (1981) 1 S.C.R. 206 p. 286-87.

C H A P T E R - IV

C O N C L U S I O N

C O N C L U S I O N

The power to pardon had been exercised from the time immemorial by a executive head of the state. As it is well established that the administration of justice through courts is a part of the constitutional scheme. Under this scheme it is for the judge to pronounce judgment and impose sentence and it is for the executive to enforce them. Generally such enforcement presents no difficulties, but circumstances may arise where carrying out the sentence or setting the machinery of justice in motion might imperil the safety of the realm. Thus, if the enforcement of such sentence is likely to lead blood-shed and revolution the executive might well pause before exposing the stake of such peril.

It is also observed in some cases[1] that the fallibility of human judgment being undeniable even in the most trained mind a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty the protection should be extended by entrusting power to some higher authority to scrutinise the validity of the threatened denial of life or continued denial of personal liberty. Such power under the parliamentary democracy is

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1. Ex Parte Grossman, 69 L.ed. 527; Kehar Singh v. Union of of India, AIR 1989 SC 653.

reposed in the highest authority of the state.

Our constitution like many others of the world does provide the presidential power of pardoning. As these provisions contained in the constitution empowers the President and Governor of state under Articles 72 and 161 respectively. Here we are concerned with the power of the President under Article 72 of the Constitution.

While using this power executive is not necessarily guided by the rules of evidence and a decision in one case may not be a precedent for subsequent cases. As many time new facts come to light after the process of adjudication through law courts exhausted in such event the power to grant. In such event the power to grant pardon or reduce the sentence would be readily justified.

Now and again do cases occur in which the Supreme Court is called upon to look into the power of the President of India to grant pardon. But in spite of the fact that there are few cases regarding this power the Supreme Court in each case either adopted or developed new principles. At the same time it is observed by the Supreme Court that the power is of widest amplitude so it is difficult to keep the President bound within specific limits.

Though Nanavati's case[2] is not directly related to Article 72 of the constitution even than it has its own values and importance of its being first case where the Supreme Court has expressed its opinion upon the constitutional importance of the pardoning power of the executive. Therefore, it is indispensable for concluding the present position of the Article 72. In this case Supreme Court slurred over the long established distinction of executive and judicial power over the sentences and held that Governor's power to suspend a sentence could not be exercised from the time the Supreme Court has seized of the matter till the matter disposed of.

Kapur, J., delivered a very convincing dissent judgment holding that the power to suspend sentence was a part of the pardoning power which could be exercised at any time and which did not conflict with the power of the court. The distinction maintained by Kapur, J. between executive and judicial power was affirmed in Rabha case[3].

As with regard to nature and scope of Article 72 of the constitution an important question was raised before Supreme Court in Ranga's case[4] where on rejecting the mercy

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2. Supra n. 28 at p.47.
3. Supra n. 32 at p.52.
4. Supra n. 34 at p.54.

petition by the President. Ranga filed a petition before the Supreme Court arguing that power conferred by Article 72 on the President to grant pardon and commute sentences was a power coupled with a duty which must be fairly and reasonably exercised. But the Supreme Court observed that court did not know whether Government of India had formulated any uniform standard or guidelines under which Article 72 was guided or intended to be guided. And upon final hearing the court further observed that executive clemency exists to afford relief from undue harshness on evident mistake in the operation or enforcement of criminal law and expressed that President's power may have to await examination on an "appropriate occasion".

In Kehar Singh case[5] the Supreme Court was called upon to examine in depth the power of pardon bestowed upon the President under Article 72 of the constitution.

The judgment clarified that the President had total discretion while considering a petition for pardon under Article 72. It is for him to decide how best he can acquaint himself with all the information that is necessary for proper and effective disposal. It is evident that the power under Article 72 entitles him to examine the record of evidence of a criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that

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5. Supra n. 46 at p. 63.

power. The court further observed that we are of opinion that the President is entitle to go into the merits of the case notwithstanding that it has been judicially concluded by the considerations given to it by this court.

Yet another point decided by the court was the scope of judicial review of President's power of pardon. The judges clarified at the outset that we are confined to the question as to the area and scope of President's power and not with the question whether it has been truely exercised on the merits.

It was further accepted by the court in this judgment that in England the power of pardon is royal prerogative and an act of grace issuing from the sovereign. On the contrary in the United States it is not a private act of grace but a part of the constitutional scheme.

Adopting the U.S. view, the Bench asserted that the power to pardon is a part of the constitutional scheme and we have no doubt in our mind that it should be so treated also in the Indian Republic.

In this case the Supreme Court felt it is not necessary to lay down guidelines for regulating the exercise of President's power of pardon to prevent arbitrariness, observing that power being of widest amplitude.

However, the important point decided in this judgment is

that of judicial review of the power of President under Article 72 of the Constitution. The court observed that President's order can not be subject to judicial review on its merits except within certain limitations as expressed in Maru Ram case[6], if the President's power be wholly irrelevant, irrational discriminatory or malafide.

While keeping in view the above cases it is vivid to conclude that President being the constitutional head of the state is vested with the power to pardon death sentence under Article 72 of the Constitution. This power is exactly the discretionary power of the President. He can come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on the accused. He acts under a constitutional power the nature of which is entirely different from the judicial power and can not be regarded as an extension of it.

However, the President is not bound to make public his reasons for decision. Secondly, the reasons for granting or not granting pardon may, despite the constitution, not be his own : that is he might be influenced totally by the notings on the files made by the Secretariate. That means the President may not really be applying his mind. Again,

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6. A.I.R. 1980 SC 2147.

we have no ways of knowing what criteria the advisers to the President follow in annotating clemency papers, and in this context how much attention do they pay to the observations of the Supreme Court in the instant case.

As there are no guidelines for exercising the power under this Article, the President and his advisers may follow any procedure in considering clemency petitions, the President's decision are non-speaking they can not be reviewed either on any known principles of administrative justice; so that there exist no merely unbridled discretion in arriving at the actual decisions but also unreviewability. Though the clemency powers are open to constitutional challenge yet unless some reasonable procedure is prescribed for the exercise of the power to pardon the judicial review can not be exercised properly. So if it is not possible to prescribe a specific guidelines for exercising this power the procedure and general guidelines must be prescribed for exercising this power under Article 72. Because without any procedure, guidelines and even without assigning any reasons for granting or not granting pardon under Article 72 the judicial review becomes virtually impossible and would be reduced to a teasing illusion.

The duty involved in the granting of a pardon or commutation of a sentence is a most delicate constitutional

responsibility because it lies within the discretionary power of the President. One single factor in considering this power to pardon is that it should not be exercised against public interest. The question which the President must consider is whether under peculiar circumstances of hardship he can grant pardon without disturbing the effects of punishment in deterring others from committing crimes.

Ultimately an act of pardon involves a deep sense of rightness or justice which goes beyond the judicial decision of the court which condemned the man.

Therefore, the cumulative effect of Maru Ram and Kehar Singh is that the Supreme Court has a power to review judicially the disposal of petition under Article 72 if it is done with irrelevant, extraneous and malafide considerations. Further, while concealing a large amount of discretion to President of India which in effect means the Council of Ministers headed by Prime Minister to exercise his power of pardon under Article 72 having all information which he needs in the instant case. It is also pointed out that the President is not bound by the decision of Supreme Court while disposing of the petition under Article 72. So far as the time limit is concern it is neither desirable nor advisable to prescribe any time limit for the disposal of petition by

the President of India under Article 72. However, it is necessary that President should take expeditious steps to dispose of the petition under Article 72 so that convict should not be made to suffer pain in the condemned cell. The fate of the convict should be known to him as early as possible.

B I B L I O G R A P H Y

Books

Basu, D.D. "Commentary on the Constitution of India"

Carter, Edward W., Rohlfing Charles, C. "American Government and its Work"

Gupta, C. Subhash "Capital Punishment in India".

Jackson, "The Wisdom of the Supreme Court".

Keir, Sir David Lindsay, "Constitutional History of Modern Britain since 1485".

Keir, D. & Lawson, F.R., "Cases in Constitutional Law".

Maitland, F.W., "Constitutional History of England".

Pylee, M.V., "Crisis Conscience and the Constitution".

Phillips, O. Hood, "Leading cases in Constitutional Administrative Law".

Rosen Joel, "Politics of Crime and Criminal Justice".

Sanford, H. Cadish, "Encyclopeadia of Crime and Justive" Vol.I

Seervai, H.M. "Constitutional Law of India", Vol. II.

Supakar Sharaddhakar, "Law of Procedure and Justice in Ancient India".

Tresoline, Rocco. J. , "American Constitutional Law".

Sutherland, "Constitutionalism in America".

Wade, E.C.S. "Constitutional Law of England".

Zink, Harold, "Government and Politics in America".

Journals and Magazines

Dhairyasheel V. Patil, "President's Power to Pardon and Judiciary" 1982 (A.P.) 88 Cri. L.J. 9-11.

G.P. Godhama Gandhi, "President's Prerogative of Mercy - A Point of View", 1982 (M): (CULR-116-22)

Satish Chandra, "Justification of Pardon by the Governor and Helpless Supreme Court" 1983 KLT 109-10.

B.R. Sharma, "Some Reflections on the Presidential Power of Pardon" (Civil & Military Law Journal, Vol. 17,18 1981-82).

Sen Walter F. Mondale, "Harnessing the President's Pardon Power" Journal of Bar Council of India, Vol.4, 1975, p. 135.

Constituent Assembly Debates, Vol. II and X.

Lex Et Juris (Law Magazine), December 1988.

Political and Legal Perspectives, Vol. 2, No. 2-3, Feb.-Mar.1989.

Political and Legal Perspectives, Vol.II, No. 4-5, April-May,1989.

Newpapers

Times of India, 9th February, 1989

Times of India, 19th December, 1988

Times of India, 25th December,1988

Times of India, 10th December, 1988 (Sorabje Soli, J. "Historic Judgment by Supreme Court".

Indian Express, December 16, 1988.

Hindustan Times, 7th December, 1988.